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In The

Supreme Court of the United States

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

ERIC LYNN MOORE,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

Following numerous arguments in the Fifth Circuit, the en banc court held that Moore established both cause and prejudice for his unexhausted and procedurally defaulted *Atkins*[1] claim, despite his failure to present any substantial factual evidence or legal argument to the Court of Criminal Appeals (CCA) in his subsequent state-habeas petition.

On rehearing, the panel granted deference to the district court's determinations of facts and conclusions of law, and held that, while other courts may have ruled differently, there was no clear error in the district court's grant of relief.

Both the en banc court's and panel's holdings give rise to two important questions:

1. Whether the district court had authority to grant relief on Moore's unexhausted and procedurally defaulted claims when he failed to establish either cause or prejudice for his failure to properly present the claims in state court; and

2. Whether the district court, and in turn the court below, erroneously interpreted Texas law in finding Moore's IQ, measured at 76 and 74 prior to his conviction, indicated significantly subaverage intellectual functioning.

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

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OPINION BELOW

The Fifth Circuit Court of Appeals, sitting en banc, remanded the case to the panel in a published opinion. PA 59-63 (*Moore v. Quarterman*, 533 F.3d 338, 342 (5th Cir. 2008)).[2] The panel subsequently affirmed the district court's grant of habeas corpus relief on August 21, 2009. PA 1-58 (*Moore v. Quarterman*, No. 05-70038, 2009 WL 2573295 (5th Cir. 2009) (op. on reh'g) (per curiam) (unpublished)).

JURISDICTION

The court of appeals' judgment was entered on August 21, 2009. No petition for rehearing was filed. The Director's petition for writ of certiorari is timely filed on or before November 19, 2009. Sup. Ct. R. 13.3 (West 2007). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 28, section 2254 of the United States Code states in pertinent part:

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[2] "PA" refers to the petitioner's appendix to the instant petition for certiorari review. "CR" refers to the clerk's record of pleadings and documents filed in the trial court. "RR" refers to the reporter's record of the trial proceedings. "SX" and "DX" refer to the State's exhibits and the defense exhibits, respectively, admitted into evidence during the trial. "SHTR" refers to the transcript of Moore's subsequent state habeas petition, cause number 38,670-02. "FHH" refers to the court reporter's record of the federal habeas hearing on Moore's *Atkins* claim. Petitioner Moore's and Respondent Thaler's exhibits from that hearing are denoted as "PX" and "RX" respectively.

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
> >
> > . . .
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise by any available procedure, the question presented.

28 U.S.C. § 2254 (West 2009).

STATEMENT OF THE CASE

I. Facts of the Crime

Moore's guilt is not in dispute. The evidence supporting the underlying capital murder conviction was briefly summarized by the state court:

> Appellant and three cohorts stopped at the rural home of the victims, a married couple, and requested automotive assistance. Pursuant to their plan, the four robbed the victims at gun point. Subsequently both the husband and wife were shot in a ransacked room of the house and left for dead. Only the husband survived.

Moore v. State, 882 S.W.2d 844, 846 (Tex. Crim. App. 1994).

II. Facts Related to Moore's *Atkins* Claim

A. Facts adduced at trial

The record indicates that Moore was the leader of the group responsible for the murder of the victim, Mrs. Ayers. During trial, the jury heard an audiotape of an interview with Moore on which he admitted to shooting Mr. Ayers because he feared being "an accessory," and wished to avoid identification. 17 RR 201, 221, 224. He further repeatedly shifted the blame for the murder to his accomplice, Anthony Bruce. *Id.* at 201-02, 207-09, 222-23. However, Mr. Ayers testified that Moore was the leader of the four men who murdered his wife. 19 RR 450.

In keeping with his ringleader status, Moore disposed of the guns and stolen property himself. 18 RR 314-17, 332-36; 19 RR 202-03. He also took Mr. Ayers' wallet, which contained $150, but later told his accomplices that the wallet only had $10 in it. 17 RR 203; 19 RR 444-45.

During the punishment phase of trial, the State outlined Moore's history of violence and criminal activity, including two prior aggravated assaults where Moore attacked unarmed victims with a knife. 22 RR 347-48. Moore later committed a third assault in which he dragged his girlfriend from an automobile by her hair, struck her repeatedly with a baseball bat, and smashed the windows of her car. *Id.* at 349-50. And in 1987, Moore assaulted yet another person, stabbing him with a broken beer bottle. *Id.* at 354.

In early 1990, Moore resisted arrest when he was picked up on outstanding warrants. *Id* at 350-51. In February of the same year, Moore resisted arrest again, requiring five officers to subdue and apprehend him. *Id.* at 352. In July 1990, Moore was apprehended for fighting, and again resisted arrest. *Id.* at 353-54.

On a different occasion, Moore was driving a car with several other occupants when he made an aggressive move toward a family crossing the street. *Id.* at 360. The father made a disparaging gesture at Moore, and Moore retaliated by pursuing the family through residential yards. *Id.* at 360-61. Moore struck two other automobiles during the chase, and eventually fled the scene. *Id.*

Defense expert, Dr. Crowder, testified that he examined Moore on June 21, 1991, and conducted a thorough investigation of the case, interviewing several people by telephone, and reviewing all relevant documents, including a prior psychological examination and contemporaneous psychological and IQ testing. 23 RR 582-84, 587. He concluded that Moore's intellectual abilities were "clearly below average" and "borderline,"

but he did not opine that Moore was mentally retarded. *Id.* at 586-88. He also testified that a recent electroencephalogram indicated Moore did not suffer from brain damage. *Id.* at 594-95.

B. Facts presented by Moore in his state habeas petition

Moore's state habeas claim of mental retardation consisted of a six-page petition, averring he was mentally retarded based on: his obtained IQ score of 74 on a 1973 administration of the Primary Mental Abilities Test (PMA); the false allegation that Moore was in special education classes "throughout school";[3] the disingenuous claim that he "was hit in the head with a baseball bat at around age nine or ten and suffered another head injury in an automobile accident during the same time frame";[4] and the fact that a Plano police officer saw Moore banging his head against the cage of a patrol car and against the wall of his jail cell. SHTR 7-9.

Moore failed to mention the score of 76 that he received on an IQ test administered in preparation for his capital-murder trial, and presented absolutely no evidence of significant limitations in adaptive functioning. Nor did he cite to the clinical definition of mental retardation recognized in *Atkins* or codified in Tex. Heath & Safety Code, section 591.003(13). Instead

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[3] The federal habeas record indicates that, at most, Moore may have attended some special education classes during elementary school. 2 FHH 49-51, 122-23, 139-44, 162-65.

[4] The trial record established that the baseball-bat incident occurred in 1987, when Moore was twenty-years old. 23 RR 589.

he erroneously argued that the cutoff IQ for defining mental retardation was 80, but that the CCA had not yet defined mental retardation under Texas law. SHTR 7-8, 9; *but see Ex parte Tennard*, 960 S.W. 2d 57, 60-61 (Tex. Crim. App. 1997) (holding that "[t]o be classified as mentally retarded, a person generally must have an IQ of 70 or below").

C. Facts presented in conjunction with Moore's federal *Atkins* claim

1. Evidence pertaining to Moore's IQ

Moore has taken three known full-scale IQ tests, two prior to his current claim of mental retardation, and one following it. At age 6, Moore scored a 74 on the PMA, administered through his school district. 1 FHH 139-40; RX 4 at 7. At age 24, Moore scored a 76 on the Wechsler Adult Intelligence Scales, Revised (WAIS-R), administered by Dr. Richard Fulbright in conjunction with Moore's capital murder trial. RX 7 at 1, 3-4, 7. At age 37, Moore scored a 66 on the Wechsler Adult Intelligence Scales, third edition (WAIS-III), administered by Dr. Llorente, the expert retained by Moore to assist in his *Atkins* litigation. 1 FHH 137-38; 2 FHH 3; PX 1 at 1, 6-7. Of these three tests, only the one taken in anticipation of his *Atkins* claim falls below the cutoff for mental retardation as defined in Texas. *See*, *Ex parte Briseño*, 135 S.W.3d 1, 7-8 & n.24 (Tex. Crim. App. 2004) (holding IQ must be "about 70 or below").

The WAIS-III exam Moore took in 2004 was improperly scored by his expert, Dr. Llorente. In his testimony, Dr. Llorente correctly noted it is very important that an IQ test be administered and scored

according to the procedure established by the test manual. 1 FHH 167. Moreover, if an error on a subtest occurs, the full-scale IQ score is questionable, and potentially invalid. *Id.* at 168-69, 173. Yet Dr. Llorente erred in his administration of the WAIS-III by prematurely discontinuing the information subtest in violation of the test rules. 2 FHH 217-18; PX 1 at 7. As a result, the full-scale IQ score of 66 obtained by Dr. Llorente is at best, an underestimate of Moore's true IQ, and at worst, wholly invalid. 1 FHH 168-69.

Additionally, Dr. Llorente was unable to rule out the possibility of malingering, or that Moore's obvious motivation to obtain a low score on the WAIS-III may have led him to dishonestly answer some questions incorrectly in order to appear mentally retarded. 2 FHH 57, 60, 62, 71. Dr. Llorente admitted that several questions Moore answered incorrectly on the WAIS-III were correctly answered during the 1991 administration of the WAIS-R. 2 FHH 57-61.

For example, Moore knew the meaning of the words "assemble" and "terminate" on the 1991 test but feigned ignorance of those words on the 2004 test. 2 FHH 55-57. Moore also correctly identified the concepts "leaf" and "mirror" on the 1991 test but not in 2004. *Id.* at 58. Further, Moore's picture-completion and arithmetic subtest scores from 2004 were substantially lower than his scores on the 1991 test. *Id.* at 58-59; *cf.* PX 1 at 7 and RX 7 at 4; 2 FHH 59. Finally, Moore answered one question concerning the concept of a "marriage license," incorrectly, despite his clear understanding of the term, evidenced by his correct use of it in written requests to prison authorities. 2 FHH 61-62; RX 2 at 163.

Dr. Llorente was also unable to rule out the possibility that high-blood-pressure medications taken by Moore at the time of the test could have negatively affected his full-scale IQ score by rendering him sluggish, and unable to perform to the best of his abilities, especially on the timed subtests. 2 FHH 64; PX 1 at 1. Auditory hallucinations and depression, from which Moore suffered at the time of the testing, could also have affected the validity of the test and could have lowered the full-scale IQ score obtained. 2 FHH 65; PX 1 at 1. Finally, Dr. Llorente did not attempt to correct for Moore's age or educational level, despite the fact that Moore is well outside the demographic group to which the WAIS-III is normally applied, and advanced age or lack of education artificially lowers IQ scores. 2 FHH 68-70, 228-30.

2. Evidence pertaining to Moore's adaptive behaviors

Dr. Mears, the Director's expert, testified that based on his clinical evaluation of Moore and review of the record, Moore was a very good historian, providing considerable detail about his early home life, academic history, work history, and criminal record. 2 FHH 209-16; RX 8 at 6-8. He opined that Moore's social/interpersonal and communication skills were better than any other capital offender he had evaluated for mental retardation, and were not significantly deficient. 2 FHH 215-16, 250-53, 257; PX 8 at 7-9. Dr. Llorente, on the other hand, identified no credible, objective evidence of significant deficits in the communication or social/interpersonal-skill areas, yet still found Moore had significant limitations in these areas. 2 FHH 73. His limited opinion regarding these adaptive areas was

apparently based on the self-serving claims made by Moore's family members that Moore stuttered or sometimes preferred to be alone. *See, e.g.*, 1 FHH 38, 44-45, 64, 66, 84. Both experts testified that stuttering is a physical problem, does not constitute a deficit in communication skills, and is not a product of mental retardation. *Id.* at 198; 2 FHH 15, 226, 240.

Larry Lambert, a science and math teacher in the Celina Independent School District (CISD), remembered Moore and recalled that he communicated effectively and interacted well with his classmates. 2 FHH 145-46; RX 4 at 8. Mary Hughes, another CISD teacher, also recalled that Moore interacted well with his classmates. FHH Deposition at 10-11; RX 4 at 9. Tyrone Brown testified Moore was a leader when he was a child. FHH Deposition at 11.

Brandon Daniel, Kyle Rains, Robert Moss, and Roger Dale Burks, all correctional officers at the Polunsky Unit in Livingston, Texas, interact with Moore on a regular basis and believe that he communicates effectively, is well liked, and socializes with others. 2 FHH 166-68, 177-78, 182-87, 193-94. Moore married Kim Butler while incarcerated on death row. *Id.* at 60; RX 2 at 165. And prior to his incarceration, Moore was involved in long-term romantic relationships and fathered a child. 2 FHH 80, 212, 251, 253, 256.

Dr. Mears opined that Moore's use of community resources, self-care, home-living, health, and self-direction skills were not significantly deficient. 2 FHH 250-53, 256-57; PX 8 at 7-9. He noted that Moore made an effort to succeed in life despite his difficult childhood. 2 FHH 254, 257; RX 8 at 7-9. However, as with other

adaptive-skill areas, Dr. Llorente assumed Moore was deficient in these areas despite identifying no credible, objective evidence of significant deficits. 1 FHH 201-02; 2 FHH 78-80, 97-89. In reaching this conclusion, Dr. Llorente relied on suspiciously similar statements made by several of Moore's family members, such as the claim that Moore had trouble dressing himself. *See, e.g.*, 1 FHH 36, 69, 103.

In contrast to stories told by Moore's family, Joan McKnight, Moore's fifth-grade teacher, recalled that Moore's hygiene was good and that he was generally clean. 2 FHH 121-22, 124; RX 4 at 8. Jerry Moore, who was Moore's school principal, remembered Moore from approximately 1979-81 and believed that his hygiene was decent. 2 FHH 150-51; RX 4 at 8. Furthermore, Moore was never referred to the school nurse for poor hygiene. 2 FHH 151. Officers Daniel, Rains, and Moss testified that Moore exhibits good hygiene and keeps his cell relatively clean, neat, and organized. *Id.* at 167, 176, 178, 184-86. Importantly, neither Ms. McKnight, Ms. Bradshaw, nor Jerry Moore — all unrelated and unbiased witnesses — suspected that Moore was mentally retarded. 2 FHH 124, 151; FHH Deposition at 8.

Dr. Llorente testified that he "couldn't find any records showing ... that [Moore] ever paid rent," leased an apartment, managed money, or sought "assistance for drug use." 1 FHH 199, 201; 2 FHH 79. He then made the leap that this lack of evidence indicated significant deficits in Moore's home living and use of community resources. *Id.* Yet he was unable to explain how Moore left home at age fifteen and lived independently with his girlfriend and child. 2 FHH 80-81. Dr. Llorente also dismissed Moore's procurement of a driver's license by

speculating, without any evidence, that "someone assisted him" in passing the test. *Id.* at 196.

Dr. Mears testified that Moore's functional academic skills were not significantly impaired. 2 FHH 254; 3 FHH 63-64; RX 8 at 4-5, 7-9. And Dr. Llorente was unable to identify any credible, objective evidence of significant deficits in the functional-academic-skill area other than his lackluster academic performance. 2 FHH 49-51, 82-84. Rather, he based his opinion on the fact Moore was receiving "large portions" of special education, and he speculated, again without any actual evidence, that Moore was socially promoted until the eleventh grade. 1 FHH 197; 2 FHH 82. But while Moore was held back in first grade and referred to "special education," the credible evidence establishes that he never attended a special-education program. *Id.* at 49-51, 122, 137, 139-43, 147-48, 154, 158-59, 162-65; RX 4 at 9. The records and testimony reflect that Moore participated in only two remedial classes throughout his academic career, and received "Bs" in those classes. 2 FHH 49-51, 122-23, 127-29, 139-43, 147, 154, 158-59, 162-65; RX 4 at 4, 8-9. Ms. McKnight testified that Moore's academic performance, which was negatively impacted by his frequent school transfers, would have improved if he had applied himself. 2 FHH 123, 139.

Despite Moore's implications that he could not graduate for academic reasons, he was actually expelled from high school for fighting. 2 FHH 19, 83; PX 5 at 9. He then attended six months of vocational training with the Job Corps in automotive mechanics, paint, and body work. 2 FHH 16-17, 83; PX 5 at 5. Moore did not complete this program because he was again expelled for fighting. 2 FHH 17-18, 83; PX 5 at 5. As both experts

admitted, antisocial or maladaptive behavior and resulting poor performance in an academic setting does not meet the criteria for significant deficits in functional academics. 2 FHH 83, 252; 3 FHH 63-64; PX 7 at 79.

At the time of the hearing Moore possessed and read numerous books, newspapers, and magazines in his cell at the Polunsky Unit. 2 FHH 88-90, 168, 176, 179, 185, 194-95, 212, 218; RX 2 at 114-121; RX 5. This literature included such titles as the Bible, the Harry Potter series, "Tombstone", "Quest of the Mountain Man", and "449 Stupid Things Republicans Have Said". RX 5. Moore also read and wrote personal letters. 2 FHH 168, 176.

Dr. Mears opined that Moore's work skills were not significantly impaired. 2 FHH 213-14, 250-54. The evidence established Moore was employed at several jobs between 1985 and 1989. *Id.* at 18, 27-35, 213-14, 254; PX 5 at 5; RX 8 at 6. Moore was never terminated from any of the jobs. *Id.* at 18, 27-35, 213-14, 254; PX 5 at 5; RX 8 at 6. In fact, he was repeatedly commended for good performance during his years of employment, and was rehired by some employers after quitting. 2 FHH 27-35; RX 3 at 46-47, 63-66, 80-82. Moore also worked in the garment factory at the Ellis Unit prior to his transfer to Polunsky Unit. 2 FHH 32. As he did with the other adaptive areas, Dr. Llorente chose to ignore these facts, and opined Moore had a significant deficit in the area of work, despite any credible, objective evidence of significant deficits in the work-skill area. *Id.* at 27-35, 80-82.

Finally, there was no credible evidence or opinion concerning significant deficits in the leisure skill area. 2

FHH 202; RX 8 at 7-9. Dr. Mears opined that Moore's safety skills were not significantly impaired, and Dr. Llorente identified no evidence of significant deficits in the safety-skill area. 1 FHH 201-03; 2 FHH 85-86, 250-557; 3 FHH 42; RX 8 at 7-9.

III. Prior Proceedings in State and Federal Court

A. Pre-*Atkins* litigation

Moore was convicted of capital murder and sentenced to death in 1991. His conviction and sentence were affirmed on direct appeal by the CCA, and this Court denied certiorari. *Moore v. State*, 882 S.W.2d 844 (1994), *cert. denied*, 513 U.S. 1114 (1995). Moore then filed a state habeas petition, which was likewise denied by the CCA. *Ex parte Moore*, No. 38,670-01 (Tex. Crim. App. 1998) (unpublished).

Moore's federal habeas application was denied in district court, and that denial was affirmed on appeal. *Moore v. Cockrell*, No. 1:99-CV-018 (E.D. Tex. 2001) (unpublished), *aff'd*, No. 01-41489, 54 Fed. App'x 591 (5th Cir. 2002) (unpublished), *cert. denied*, 538 U.S. 965 (2003).

B. Postconviction litigation related to Moore's *Atkins* claim

After Moore unsuccessfully appealed the constitutionality of his conviction, this Court held the execution of mentally retarded persons violates the cruel and unusual punishments clause of the Eighth Amendment of the United States Constitution. *Atkins*, 536 U.S. at 321. Following this ruling, Moore filed a

subsequent state habeas petition, alleging he was mentally retarded and thus ineligible for execution. PA 98-99 (*Ex parte Moore*, No. 38,670-02 (Tex. Crim. App. 2003) (unpublished)). The CCA examined Moore's subsequent petition, which contained incomplete and partially inaccurate facts, and dismissed it without reaching the merits, holding that the petition "fail[ed] to contain sufficient specific facts which would satisfy the requirement of Art. 11.071, Sec. 5(a), V.A.C.C.P." PA 98-99.

Following the CCA's procedural dismissal of Moore's *Atkins* claim, Moore requested and received permission to file a subsequent federal habeas petition under 28 U.S.C. § 2254 (b)(3)(C). *In re Moore*, No. 03-40207, 67 Fed. App'x 252 (5th Cir. 2003) (unpublished). The district court subsequently granted relief based on the CCA's failure to address the merits of Moore's *Atkins* claim. *Moore v. Cockrell*, No. 6:03-CV-224, 2003 WL 25321830 (E.D. Tex. 2003) (unpublished). The Fifth Circuit reversed and remanded the case, holding the state court's application of its own procedural rules did not constitute grounds for relief. *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004).

Following a live evidentiary hearing on the *Atkins* issue, the district court again granted relief, this time finding Moore sufficiently established he was mentally retarded under Texas law. PA 64-97 (*Moore v. Dretke*, No. 603-CV-224, 2005 WL 1606437 (E.D. Tex. July 1, 2005)). On appeal, the Fifth Circuit reversed the district court based on Moore's failure to properly exhaust his *Atkins* claim in state court, and ordered the district court to dismiss the petition without prejudice. *Moore v. Quarterman*, 454 F.3d 484, 486 (5th Cir. 2006).

Moore petitioned for rehearing, and the panel vacated the judgment of the district court and remanded the case with orders for the district court to dismiss the case with prejudice as being both unexhausted and procedurally defaulted. *Moore v. Quarterman*, 491 F.3d 213, 215 (5th Cir. 2007). Moore again applied for rehearing, and the en banc court reversed the panel opinion, holding Moore had established both cause for his failure to present evidence of mental retardation in state court, and prejudice resulting from the state court's procedural dismissal. PA 63. The court returned the case to the panel to address the merits of the State's claim that the district court erred in finding Moore to be mentally retarded. *Id.* On rehearing, in a divided opinion, the panel affirmed the finding of the district court. PA 17. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The District Court Did Not Have Authority Under AEDPA to Grant Relief on Moore's Unexhausted and Procedurally Defaulted *Atkins* Claim.

The exhaustion provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) are based on the longstanding doctrines of federalism and comity, which promote state-court resolution of constitutional claims arising in state proceedings. *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (citations omitted). When federal courts usurp a State's duty and right to correct constitutional errors that occur in its courts, the balance between the individual States and the union of those States is disrupted. Since the codification of the exhaustion doctrine in 1948, federal courts have been generally divested of the authority to hear unexhausted claims

without first giving state courts a full and fair opportunity to address any potential errors. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). And since AEDPA's enactment, courts are expressly divested of the authority to grant relief on an unexhausted claim unless the petitioner can show both cause and prejudice for his failure to exhaust his state court remedies. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

As demonstrated below, Moore's *Atkins* claim, which was inadequately presented to the state court, is unexhausted and procedurally defaulted, and Moore can show neither cause nor prejudice sufficient to overcome AEDPA's strict exhaustion requirements. The lower court's opinion holding Moore is entitled to federal relief flies in the face of the deep-seated exhaustion principles found in federal habeas jurisprudence, and disrupts the balance between federal and state courts. This Court should therefore grant certiorari to re-establish the balance between the federal and state courts by permitting the State of Texas to examine and decide Moore's mental retardation claim.

A. Moore's *Atkins* claim is unexhausted and procedurally defaulted.

"Exhaustion means more than notice," and requires a petitioner to fairly present a constitutional claim and its supporting factual allegations to a state court before seeking federal habeas relief. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992); *Picard v. Connor*, 404 U.S. 270, 276 (1971). A petitioner must, at the very least, give the state court the ability to understand their claims, and determine whether such claims amount to constitutional error. *See Baldwin v. Reese*, 541 U.S. 27,

30-32 (2004) (holding state courts are not required to ready beyond the pleadings presented to discover the legal or factual claims being presented). Accordingly, when material, additional evidentiary support that fundamentally alters or significantly bolsters a claim is presented for the first time in federal court, exhaustion is not satisfied. *Vasquez v. Hillery*, 474 U.S. 254, 259-60 (1986).

Moore unquestionably failed to fairly present his *Atkins* claim to the state court. Instead, he submitted a sketchy subsequent petition containing inaccurate and incomplete information, and lacking readily available additional support for his skeletal claim. In the two pages of argument Moore submitted, he articulated only four factual allegations, two of which were, at the very least, inaccurate. SHTR 7-9.

First, Moore noted that his IQ was "referenced in school tests at 74." *Id.* at 7. In support of this, he cited to the trial transcript where his own expert, Dr. Crowder, noted that Moore had two previous IQ scores of 76 and 74. 23 RR 586. However, Moore failed to make any mention of the 76 IQ score in his argument to the CCA.[5] SHTR 7-9.

Moore then erroneously declared that "[a]n IQ of 80 or below is the mental retardation range." SHTR 7-8.

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[5] On the very page listing Moore's IQ scores, his own expert also observed that the scores were "clearly below average. According to the testing that has been done, they fall in what we call borderline intellectual functioning." 23 RR 586. Thus, by Moore's own expert's admission, he did not meet the criteria for significantly subaverage intellectual functioning. For obvious reasons, Moore also failed to mention this statement in his subsequent petition.

To support this wholly inaccurate contention, Moore cited to the testimony of a defense expert from an unrelated case. *Id.* at 8, 14. He made no attempt to support his assertion with any case law. And he made no mention of this Court's definition of mental retardation in *Atkins*, or Texas's definition of mental retardation codified in the Health and Safety Code, and referenced five years earlier in *Ex parte Tennard*. *See Atkins*, 536 U.S. at 309, n. 3 (citing the AAMR and APA definitions of mental retardation); Tex. Health & Safety Code § 591.003(13) (defining mental retardation); *Ex parte Tennard*, 960 S.W. 2d 57, 60-61 (Tex. Crim. App. 1997) (defining mental retardation in the context of capital-sentencing mitigation evidence).

Moore's next equally fallacious contention was that "Moore was in special education throughout school." *Id.* at 8. He cited to his expert's equivocal statements during trial that while he didn't "recall the specific years," he thought Moore was in special education "much of the time." 23 RR 612-13. The fully developed federal habeas record, however, demonstrates that, based on the records available, Moore was rarely, if ever, in special education. 2 FHH 49-51, 122-23, 139-44, 162-65.

The next assertion made by Moore was that he was hit in the head with a baseball bat "at around age nine or ten, and suffered another head injury in an automobile accident during the same time frame." SHTR 8. However, the trial record indicates that the reported baseball-bat injury allegedly occurred four years prior to trial, when Moore was approximately twenty years old. 23 RR 589. Furthermore, Moore presented absolutely no supporting evidence, such as easily-obtainable medical records, to corroborate either of these alleged injuries.

Without supporting evidence, it is impossible to determine whether Moore's alleged automobile accident occurred four years prior to trial, or when Moore was around ten...or whether it occurred at all.

Finally, Moore noted that, when resisting arrest, he had a tendency to bang his head on the cage of the police car, or walls of his cell. SHTR 8-9. Moore offered nothing to establish that this behavior ever caused any serious head injury, much less mental retardation. *Id.* Nor did he even attempt to show that the actions occurred prior to the age of eighteen. *Id.*

Conspicuously missing from Moore's argument were any mention of Moore's alleged deficits in adaptive behavior areas. However, in federal court, Moore did present evidence, much of which was readily available at the time he filed his petition in state court. For example, Moore could have, but did not present both of the known IQ scores. Likewise, he could have presented, but inexplicably did not present, affidavit-testimony from Moore's family members, or reports from either of the two psychological experts utilized during trial.

Because Moore failed to present the state court with even the already-known facts, the CCA was left to assume Moore had no evidence to present, and properly procedurally barred his subsequent petition. As a result, the district court did not have the authority under AEDPA to grant relief on Moore's unexhausted and procedurally defaulted *Atkins* claim. *Reese,* 541 U.S. at 31-32; *Coleman*, 501 U.S. at 729; *Gray v. Netherland,* 518 U.S. 152, 161-62 (1996); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

B. Moore failed to establish cause for his failure to properly present his *Atkins* claim in state court.

This Court has made clear that to establish cause for failure to properly exhaust a claim, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The factual or legal unavailability of a claim would constitute sufficient cause, *see id.*, but "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Engle v. Isaac*, 456 U.S. 107, 130 (1982). The petitioner must put forth a good faith effort in state court, and only then, if he is prevented from having his claim heard, can he succeed in showing cause.

The court below attributes Moore's failure to properly present his *Atkins* claim to the CCA's lack of guidance on what to present in a subsequent *Atkins* petition. PA 62-63 (noting that, prior to its opinion in *Ex parte Williams*,[6] the CCA had never detailed "the factual criteria that must be pled in an *Atkins* petition"). In reaching this conclusion, the court apparently placed no significance on the fact that the CCA outlined a definition for mental retardation in the context of capital sentencing in *Tennard*, five years before Moore filed his *Atkins* claim. *See Ex parte Tennard*, 960 S.W. 2d at 60 (using the AAMR and Texas Health and Safety Code

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[6] No 43907-02, 2003 WL 1787634, at *1-2 (Tex. Crim. App. 2003) (Cochran, J. concurring) (unpublished).

definitions to establish a working definition).

Furthermore, the plain language of Texas's bar on subsequent habeas petitions clearly requires a petitioner to argue sufficient facts to establish a claim. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). Regardless of whether Moore could foresee the inevitable path that Texas law would take in defining mental retardation, he knew—from this Court's opinion in *Atkins*, and from the CCA's opinion in *Tennard*—that *some* definition of mental retardation would have to be used, and it would undoubtedly require more than a single IQ score in the borderline range, and some self-reported bump on the head, to establish a viable claim.

In fact, in *Isaac*, this Court held that the petitioner's claim of lack of notice was entirely insufficient when the basis for the claim had previously been established in federal court. 456 U.S. at 131-33. Like the petitioner in *Isaac*, Moore's failure to properly present his claim in state court falls squarely on his own shoulders. As demonstrated above, a definition for mental retardation was available under Texas law, and Moore could have made a colorable showing of mental retardation sufficient to overcome the procedural bar to subsequent petitions with minimal effort, but he chose not to try.

Judge Cochran's concurring opinion in *Williams* demonstrates just how lacking Moore's subsequent petition was. As she noted, Article 11.071, section 5(a) of the Texas Code of Criminal Procedure has — as a threshold matter — required a sufficient showing of specific facts since its enactment in 1995. *Ex parte Williams*, 2003 WL 1787634 at *1-2. It is true that

Williams gave petitioner's more understanding regarding what the CCA would require to make a successful showing of a colorable mental retardation claim, but the plain language of the statute makes clear that the petitioner must at least present a prima facie case.

Moore's four factual allegations, two of which were directly refuted by the record, did not come close to meeting the section 5 bar of subsequent petitions, regardless of what guidance was available at the time of Moore's filing. While the court below may be correct in more closely scrutinizing procedurally-barred subsequent *Atkins* claims filed in state court prior to *Williams*, such a review of this case makes clear that Moore's half-hearted attempt to throw a claim together cannot suffice. Moore simply cannot show adequate cause for his failure to exhaust his claim.

C. Moore cannot establish prejudice for his failure to properly present his *Atkins* claim in state court.

Assuming he had sufficient cause, Moore cannot establish prejudice for his failure to properly exhaust. To do so he must show that the procedural default of his claim would result in error of constitutional dimensions. *United States v. Frady*, 456 U.S. 152, 170 (1982). The court below ruled without explanation that "Moore would plainly suffer prejudice from being unable to establish the facts involved in his mental retardation claim." PA 63. However, Moore still has an available state-court remedy in the form of yet another subsequent state-habeas petition.

Texas law provides for the consideration of subsequent claims not only when a new rule of law is established, but also, if a petitioner can show "by clear and convincing evidence," that "but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3).

The CCA has expressly held that "a subsequent habeas applicant may proceed with an *Atkins* claim if he is able to demonstrate to this Court that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is mentally retarded." *Ex parte Blue*, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007). This holding has since been applied in other Texas cases, including *Ex parte Woods*, where the court expressly held that a petitioner could re-litigate a fully adjudicated *Atkins* claim in state court if he met the section 5(a)(3) standard. — S.W. —, 2009 WL 3189179 (Tex. Crim. App. 2009); *see also Ex parte Sells*, No. WR-62552-02, 2007 WL 1493151 (Tex. Crim. App. 2007) (unpublished) (holding Sells did not meet threshold requirement of 11.071 §5(a)(3) to warrant consideration of subsequent *Atkins* claim).

In sum, Moore had the opportunity to have his mental retardation claim considered in state court, but he chose to present so little evidence that the CCA was left with no choice other than to dismiss his successive petition for failure to state a claim. Notwithstanding his failure to properly present his claim on his first attempt, he could still go back to state court and re-litigate his

claim by showing by clear and convincing evidence that "no rational finder of fact would fail to find he is mentally retarded." *Blue*, 230 S.W.3d at 154. Because this state-court remedy is still available to correct any constitutional infirmity in his sentence, Moore cannot show prejudice for his unexhausted and procedurally defaulted claim.

The Fifth Circuit's broad holding in this case that any attempt at alleging mental retardation prior to *Williams* is sufficient to show cause and prejudice wholly negates the import of this Court's cause and prejudice standards. For this reason, this Court must grant certiorari to correct the court below's erroneous and wide-reaching application of law.

II. The District Court Erroneously Interpreted Texas Law, and Incorrectly Determined that Moore Had Significantly Sub-average Intellectual Functioning.

The CCA has been clear that, in order to succeed on a claim of mental retardation, a petitioner must demonstrate an IQ of 70 or below. *See* PA 29, n. 21 (Smith, J. dissent) (listing several Texas cases noting a bright-line cutoff for IQ). Even in the cases that do not state a bright line cutoff, the CCA's language indicates the cutoff point is "about 70." *See, e.g., Ex parte Woods*, 2009 WL 3189179 at * 1 (noting significantly subaverage general intellectual functioning in defined as an IQ of "about 70 or below.") (*citing Briseño*, 135 S.W.3d at 7 n. 24). Thus, any analysis of the IQ prong of the test for mental retardation should begin with a determination of whether the petitioner's IQ falls above or below the cutoff

of 70.[7]

The district court articulated the correct definition of significantly subaverage intellectual functioning, but then patently refused to apply it, and took the extraordinary measure — never before taken by the CCA or the court below — of averaging all of Moore's known full-scale scores to determine his actual IQ. PA 73. The court did not consider the reliability of any of the tests — something both experts discussed at length — and likewise did not consider the score adjustments that either expert advocated. *Id.* at 73-74. The court erred again by assuming that an average IQ score of 72 demonstrated significantly subaverage general intellectual functioning. *Id.*

To reach this conclusion, the court had to make multiple assumptions. The first is that the standard error of each of the IQ tests was plus or minus five points. *Id.* In fact, Moore's own expert testified that the standard error associated with the WAIS-III that he administered resulted in a confidence interval of 63 to 70, or plus or minus 4 points from Moore's score of 66. 1 FHH 166. He further testified that the confidence interval for the PMA was unknown. *Id.*

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[7] The court below is clearly divided on the state of Texas law regarding whether Texas has established a bright-line cutoff for the IQ prong of the mental retardation definition. *See* PA 10-11, n. 5, 28-33. It is because of confusion such as this over the correct interpretation of state-law issues that federal courts should dismiss unexhausted cases without prejudice and permit state courts to make the first attempt at resolving state-law questions. As the majority noted, "the ultimate responsibility for providing guidance and clarifying the relevant standard . . . rests with the Texas court, not with us." *Id.* at 10-11, n. 5.

The district court's next error was to assume — again without any evidentiary support — that the standard error for the average of the three tests would be plus or minus five points. Dr. Llorente testified that while each subtest of the WAIS-III had some standard error associated with it, the full-scale score had less standard error than the individual subtests. *Id.* at 151. Thus, the only analogous evidence presented indicates that the averaged scores may have less error than the individual tests. In any event, without supporting statistical evidence, such an assumption cannot form the basis of a sound judicial determination of this complex factual issue.

Most importantly, the court erred in assuming the average score should be reduced to account for standard error. As noted by Judge Smith in his dissent, the CCA has consistently held that IQs between 70 and 75 alone are insufficient for a finding of mental retardation." PA 30 (citing Texas cases in which IQ scores between 70 and 75 were insufficient to warrant habeas relief on an *Atkins* claim). In fact, in *Clark v. Quarterman*, the court below expressly approved of the CCA's refusal to lower an IQ score to account for standard error without evidentiary support justifying such an action. 457 F.3d 441, 445-46 (5th Cir. 2006)[8] Thus, the district court should have

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[8] When adjusting a score or group of scores for standard error, the approach most commonly used by the CCA, and in turn the Fifth Circuit, is to analyze each test individually, and reduce or increase the score or scores based on the relative reliability of the tests in the context of the individual case presented. *See, e.g., Rivera v. Quarterman*, 505 F.3d 349, 362 (5th Cir. 2007) (offering "a reasoned basis" for how the court weighed each test presented); *Taylor v. Quarterman*, 498 F.3d 306, 307 (5th Cir. 2007) (same) ; *Woods v. Quarterman*, 493 F.3d 580 (5th Cir. 2007) (giving greater

started with the assumption that its estimate of Moore's IQ was accurate, and only adjusted it based on credible evidence presented by either party.[9] If the court did this, it certainly didn't make any mention of it in the opinion. PA 72-74. Rather, it apparently assumed that, since standard error exists, Moore's IQ should be lowered to account for it. *Id.* at 73-74.

Finally, the district court erred in finding the Director's expert agreed that Moore satisfied the intellectual-functioning prong of the mental retardation definition. *Id.* at 73. As aptly explained by Judge Smith in his dissent, Dr. Mears never stated Moore met the first prong of the definition of mental retardation. *Id.* at 23-27. At most, his alleged concession on cross-examination was

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weight to pre-eighteen scores than scores attained in preparation for *Atkins* claim); *In re Mathis*, 483 F.3d 395, 398 (5th Cir. 2007) (discounting IQ score of 62 "because of [the expert's] belief that [the petitioner's] limitations stemmed from heavy drug use and did not manifest themselves prior to [the petitioner's] eighteenth birthday"); *In re Henderson*, 462 F.3d 413, 416-17 (5th Cir. 2006) (looking at a specific test's confidence ban in order to determine if a particular score range is a "reliable conclusion"); *Hunter v. State*, 243 S.W.3d 664, 671 (Tex. Crim. App. 2007) (discounting a lower score based on the expert's belief that "appellant's uneven acquisition of knowledge served to artificially lower" that score); *Howard v. State*, 153 S.2.3d 382, 387 (Tex. Crim. App. 2004) (rejecting a score entirely because it was based on "only portions of an I.Q. test on which [the expert] had based an estimate of the appellant's I.Q.").

[9] The record indicates that both parties made arguments to support adjusting the scores: both parties found errors in at least one of the three tests, and both parties made arguments for adjusting at least one of the tests to account for various factors such as age, socioeconomic background, and level of education. *See* 1 RR 140-41, 167-75; 2 RR 216-20. The district court's opinion does not appear to consider any of this testimony.

that, even assuming the IQ scores were valid, in his opinion Moore is not mentally retarded. In his expert report, Dr. Mears unequivocally stated "Mr. Moore does have intellectual limitations, but his intelligence scores and adaptive behavior estimates do not in my judgment approximate the mild mentally retarded features outlined by the AAMR." RX 8 at 9. And on direct examination, he questioned the validity of the 66 score Moore obtained on Dr. Llorente's administration of the WAIS-III, Moore's only score in the range of mental retardation. 2 RR 216-20. The district court erred in supporting its legal conclusion of significantly subaverage general intellectual functioning on its misinterpretation of Dr. Mears' testimony.

In sum, the district court arbitrarily reduced its erroneously-created average IQ despite the *Briseño* court's warning that, "IQ tests differ in content and accuracy." *Ex parte Briseño*, 135 S.W. 3d at 7 n 24. The court then compounded this error by misconstruing the testimony of the State's expert. Because the two premises that the district court based its legal conclusion about Moore's IQ on were both erroneous, the court below erred in affirming the district court's grant of habeas relief. Moore did not show that his scores were inflated, and without such evidence, Texas law requires a finding of insufficient evidence to establish significantly subaverage general intellectual functioning. And this Court should therefore grant certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX I

FILED AUGUST 21, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-70038

ERIC LYNN MOORE
Petitioner-Appellee
v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
Respondent-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
No. 6:03-CV-224

Before SMITH, GARZA, and DENNIS, Circuit Judges.
PER CURIAM:*

The state's appeal of the district court's grant of Eric Lynn Moore's petition for writ of habeas corpus was returned to this panel from the en banc court. We affirm.

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* Pursuant to 5TH CIRCUIT R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRC. R. 47.5.4

I

Moore was convicted and sentenced to death for the murder of Helen Ayers in 1991. The Texas Court of Criminal Appeals ("TCCA") affirmed Moore's conviction and death sentence in 1994, and rejected Moore's first habeas petition. The federal district court denied Moore's habeas petition and this Court affirmed in 2002. *See Moore v. Cockrell*, No. 01-41489, 54 F. App'x. 591 (5th Cir. 2002).

In 2002, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, holding that the execution of a mentally retarded inmate violates the Eighth Amendment. Moore filed a second state habeas petition with the TCCA, claiming that he was mentally retarded and thus ineligible for the death penalty under *Atkins*. The TCCA denied Moore's claim. *Ex Parte Moore*, No. 38,670-02 (Tex. Crim. App 2003). Moore then filed a federal habeas petition, again making his *Atkins* claim. This Court authorized him to file a successive §2254 petition. *In re Moore*, No. 03-40207, 67 F. App'x. 252 (5th Cir. May 12, 2003). Further procedural activity ensued in this Court and in the district court, eventually resulting in Moore being granted an evidentiary hearing by the district court. After considering the evidence, the district court found Moore to be mentally retarded and enjoined the State from executing him.

The State appealed the district court's ruling. This panel reversed the ruling on procedural grounds. *Moore v. Quarterman,* 454 F.3d 484 (5th Cir. 2006). Moore petitioned for rehearing *en banc*, and the panel withdrew its opinion, replacing it with a second opinion that also reversed the district court on procedural grounds. *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007) Moore filed a second petition for rehearing *en banc*, which was granted. The *en banc* Court reversed the panel, finding

that Moore had established cause and prejudice for failure to exhaust his *Atkins* claim in state court. The case was returned to the panel for review of the district court's determination on the merits of Moore's *Atkins* claim. *Moore v. Quarterman*, 533 F.3d 338, 342 ("We return this case to the panel for review of the ultimate *Atkins* determination of mental retardation under the clear error standard.")

II

To succeed on an *Atkins* claim, a defendant must prove by a preponderance of the evidence that he is mentally retarded. *Lewis v. Quarterman*, 541 F.3d 280, 283 (2008). We review a district court's findings of fact for clear error and its conclusions of law *de novo*. 28 U.S.C. § 2254(d); *e.g. Lewis*, 541 F.3d at 283. The question of whether a defendant suffers from mental retardation is a question of fact, and thus subject to clear error review. *See Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006). Factual findings are clearly erroneous only if they are implausible in light of the record as a whole. *Rivera v. Quarterman*, 505 F.3d 349, 360 (5th Cir.2007). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, thefactfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985) (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949)). A reviewing court accords deference to determinations of credibility made by the factfinder; this deference also extends to findings based on "physical or documentary evidence or inferences from other facts." *Id.* at 574.

III

The district court conducted its assessment of the facts under the framework developed by the Texas Criminal Court of Appeals in *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Ct. Crim. App. 2004), which provides the guidelines for determining mental retardation for the purposes of *Atkins* claims.[1] Under *Briseno*, a capital defendant must prove by the preponderance of the evidence that he is mentally retarded. This burden of proof applies to three showings: (1) the defendant had significant subaverage intellectual functioning, (2) with related limits in adaptive functioning, and (3) the onset of which occurred prior to the defendant turning eighteen. This "three-pronged test" is an adaptation of the definition of mental retardation provided by the American Association for Mental Retardation (AAMR) and set out in section 591.003(13) of the Texas Health and Safety Code. *Briseno*, 135 S.W.3d at 7. The district court focused the bulk of its analysis on intellectual and adaptive functioning.[2]

A

Significantly subaverage intellectual functioning

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[1] The Texas legislature has yet to enact legislation for determining mental retardation under *Atkins*. *See, e.g. Neel v. State*, 256 S.W.3d 264, 270 (Tex. Ct. Crim. App. 2008) ("Over four years later [following *Briseno*], the Texas legislature still has not enacted any legislation on this matter.")

[2] The state does not argue that the district court erred in finding that Moore fulfilled the third criterion of the *Briseno* test: manifestation of significantly subaverage intellectual functioning and related adaptive deficits before the age of eighteen. See Moore v. Dretke, 2005 WL 1606437,*15 (E.D.Tex. July 1, 2005).

is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). *Briseno*, 135 S.W.3d at 7 n.24 (citing to AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Text Revision, 4th ed. 2000) (hereinafter "DSM-IV"); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION N1 (Grossman ed.1983)(hereinafter "AAMD")). IQ tests may overstate or understate the subject's actual level of intellectual functioning. *See, id.*, 135 S.W.3d at 8 ("Psychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded while a person whose IQ tests below 70 may not be mentally retarded.").

The standard instrument for measuring intellectual functioning is the Wechsler Adult Intelligence Scales test (WAIS III). *Atkins*, 536 U.S. at 309 n.5. Moore presented the results of two Wechsler-based IQ tests before the district court. His scores were, respectively, 76 (on a Wechsler Adult Intelligent Scale-Revised, or WAIS-R, test,) and 66 (on the WAIS III test). He also presented the results of a 1973 Primary Mental Abilities (PMA) Test that was administered by his school; the result was 74. The most recent test, the WAIS III, was conducted in conjunction with a test of non-verbal abilities (TONI-2), which reduces the impact of the test taker's educational background on his score. Moore's expert, Dr. Antonin Llorente ("Dr. Llorente"), testified that the TONI-2 results placed him in the bottom eight-tenths percentile of the entire population.

The district court based its holding that Moore had proved by preponderance of the evidence that he exhibited significant subaverage intellectual functioning

on two facts: First, the court found that the State's expert, Dr. Gary Mears ("Dr. Mears"), agreed under cross-examination that Moore satisfied the intellectual functioning prong of the *Briseno* test; second, the court averaged the three IQ test scores, for a score of 72, and applied a fivepoint standard error of measurement. The district court found that the result satisfied the AAMR criterion of subaverage intellectual functioning. The State argues that both findings were clearly erroneous because (1) its expert did not "concede" that Moore satisfied the intellectual functioning prong; and (2) all three of the test scores are so unreliable as to be invalid.

The district court relied on the following exchange between Moore's lawyer and Dr. Mears, in reference to the intellectual functioning prong of the *Briseno* test:

> Q: So you agree with Dr. Llorente that whether we use the DSM[-IV] definition or the AAMR definition, the first prong is satisfied in your professional opinion?
>
> A: The prong in terms of—I have some questions about his accuracy of score, but I would still, nevertheless, because of my opinion about the adaptive functioning, I will accept that.
>
> Q: You do accept that?
>
> A: I will accept it.
>
> Q: Because I don't want to spend half a day talking about it?
>
> A: Right. I will accept it—regardless of the scoring errors, I still will accept it.

The discussion then moved on to the adaptive functioning prong of the *Briseno* test.

Though the State contends that this exchange does not constitute a "concession" by Dr. Mears that Moore satisfies the intellectual functioning prong, we find that it is at best ambiguous and defer to the district court's view of the testimony. It is clear that Dr. Mears did not consider Moore to be mentally retarded because (in his assessment) the strength of Moore's adaptive functioning outweighed any limitations in intellectual functioning. However, it is also a reasonable interpretation of Dr. Mears' testimony that he believed Moore to have significant limitations in intellectual functioning based solely on his IQ test scores.

The dissent characterizes Dr. Mears' prior testimony about the IQ tests as breaking dramatically with his later agreement that Moore satisfied the intellectual functioning prong. On the contrary, the report submitted by Dr. Mears one day before he testified, which the dissent references, clearly states, "I accepted the results of the administration, testing, and scoring of the intelligence testing done by both Drs. Llorente and Fulbright. Psychometrically, the scores are rather consistent considering a more than a decade lag." Though Dr. Mears discusses the IQ tests at length in his testimony, he never states that any scoring error in the administration of the WAIS-III renders it so unreliable or inaccurate such that it could not be used to determine intellectual functioning. Rather, he maintains reservations about potential scoring errors (though he does not state that the test should be thrown out altogether) and disagrees about the degree to which reliance on the scores alone, without analysis of adaptive functioning, can be the basis for making an overall determination of mental retardation. Dr. Mears' views on

Moore's adaptive functioning, and his overall view that Moore is not mentally retarded, is not incompatible with agreement that Moore's intellectual functioning as measured by the IQ tests satisfies *Briseno*. The point is that the district court's interpretation of the exchange, in light of the other documentary and evidentiary testimony, was reasonable. We are not left with the "definite and firm conviction that a mistake was committed." *Anderson*, 470 U.S. at 574-75.

The State argues next that the unreliability of all three test scores nullifies any basis upon which to base the intellectual functioning finding. The State also points to evidence it says indicates that Moore deliberately scored poorly on the WAIS-III test.

While there was conflicting testimony as to the presence of scoring errors on all three tests, the district court had a clear basis in the record to find that the scores were consistent after accounting for their margins of error, and were thus collectively a sufficiently reliable indicator of Moore's IQ. For example, Dr. Mears stated at the hearing that he did not administer his own independent test because he "had sufficient number of tests of the quantify intelligence tests [sic] to at least get a view of how [Moore] compares with the people that take those tests." Dr. Llorente testified that "we are not trying to reach here a conclusion about a patient's intellectual level on the basis of one test alone. That is not the right thing to do, and I agree with Dr. Mears on that. So it should be on the basis of multiple, for example procedures, which is what we did." In averaging the test scores and relying on the five-point margin of error that Dr. Llorente testified was applicable to each score, the district court attempted to find a way to reconcile all

three test scores.[3]

The district court also heard expert testimony that supported the averaging of the three scores and the application of the confidence interval. Dr. Llorente extensively testified as to each of the testing protocols and noted that, despite potential scoring errors and various other considerations, all three tests demonstrated consistency in their findings; he also testified that a five point margin of error was applicable to each test score. Relying on the AAMR definition and how the AAMR accounts for the standard error of measurement, Dr. Llorente testified that a score of "75 and below would be considered mental retardation." In the expert report he submitted to the district court, Dr. Mears also noted that the AAMR associates mild mental retardation with IQs ranging from 50 to 75.[4]

Thus, there were several bases to support the district court's finding that Moore satisfied the intellectual functioning prong of the *Briseno* test: the existence of the WAIS III score below 70; Dr. Llorente's testimony that the other two adjusted test scores were

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[3] The district court could have relied solely on Dr. Llorente's testimony and concluded that Moore demonstrated significant subaverage intellectual functioning, especially as it expressly found Dr. Llorente's testimony to be more credible than Dr. Mears as to all three *Briseno* criteria, given the greater comprehensiveness of Dr. Llorente's examination. *Moore*, 2005 WL 1606437 at *13.

[4] Dr. Mears never addressed in his testimony whether a score of 75 or below was compatible with a finding of mental retardation. As previously discussed, Dr. Mears testified that IQ test scores alone, without consideration of educational and cultural factors, could not be used to determine whether an individual was mentally retarded.

consistent with the WAIS III score considering the standard errors of measurement; and Dr. Llorente's testimony that a score of 75 or less constitutes mental retardation.[5] Based on this evidence, we find no clear

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[5] Judge Smith would hold that, under Texas law, there is a bright-line IQ score cutoff of 70 and apply it in this case. Notwithstanding the fact that the State never made this argument before the Court, and thus we found no reason to address it, we note that neither *Briseno* nor its progeny establish that such a bright-line cutoff exists. The TCCA decisions which apply the *Briseno* criteria do not change the standard outlined in *Briseno*, which defined significantly subaverage functioning as occurring in persons with an "IQ of *about* 70 or below (approximately 2 standard deviations below the mean)." 135 S.W.3d at 7 n.24 (citing to DSM-IV and AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION N1 (AAMD)) (emphasis added). The *Briseno* court declined to create any presumption that mental retardation must be established by IQ scores lower than 70. *See Briseno*, 135 S.W.3d at 7 n.24 (declining to adopt Ohio's rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70). *Briseno* did not alter the standards outlined in *Atkins*, which states that mental retardation can be found in range of 70-75. 536 U.S. at 309 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.") TCCA cases are not in conflict with *Briseno* or *Atkins*. *See e.g. Ex parte Modden*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004) ("the applicant's IQ scores of 58 and 64 are well below the 70-75 score that generally indicates subaverage general intellectual functioning."). *Briseno* makes clear the accounting for the standard error of measurement is an inquiry conducted by the factfinder based on expert testimony. *See Briseno*, 135 S.W.3d at 7 n.24 (recognizing that "[p]sychologists and other mental health professionals are flexible in their assessment of mental retardation" and that a person tested with an IQ above 70 may be mentally retarded); *id.* at 14 n. 53 (discussing expert disagreement as to application of the confidence interval and ultimately rejecting application due to lack of evidence in the record). The criticism that the majority fails to take the opportunity to "make sense of Texas's jurisprudence regarding retardation. . . and to provide guidance" is misplaced. First, the ultimate responsibility for providing guidance and clarifying the

error.

Finally, the district court also rejected the evidence proffered by the State of "malingering" by Moore. *See id.* ("Moore's scores on [ ] tests [other than the PMA] showed no response bias, which is an attempt by Moore to perform poorly.").

We therefore find that, because the record supports the district court's assessment of Moore's intellectual functioning, the district court did not clearly err in holding that Moore satisfies that prong of the *Briseno* test.

B

The district court spent the bulk of its opinion discussing evidence under the adaptive functioning prong of the *Briseno* test. Under this prong, the factfinder looks for "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales." *Briseno*, 135 S.W.3d at 7 n.25 (citing AMERICAN ASSOCIATION ON MENTAL DEFICIENCY (AAMD), [CLASSIFICATION IN MENTAL RETARDATION 11].

In arguing that the district court clearly erred in its evaluation of the adaptive functioning evidence, the

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relevant standards, especially to the degree that such "clarification" actually calls into question the language articulated in *Atkins* and in *Briseno*, rests with the Texas courts, not with us. *See Atkins*, 536 U.S. at 317 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.") (internal citations omitted). Second, we are reluctant to create new law in this area where the parties fail to identify or address these novel issues.

State primarily argues that the "great weight" of the evidence cuts the other way, and that the district court abused its discretion in how it conducted its factfinding. Again, however, we must be mindful of the deferential lens through which we view the lower court's credibility determinations and conflicting testimony and evidence. The district court relied exclusively on the AAMR's guidelines for determining mental retardation, and followed the AAMR in examination of three areas: Moore's conceptual skills, Moore's social skills, and Moore's practical skills.[6] *Moore*, 2005 WL 1606437 at *5. The district court considered "experts' clinical judgments and other evidence to determine whether Moore [had] significant deficits that place him approximately two standard deviations below the mean in adaptive functioning." *Id.* at 6. As part of assessing the "clinical judgment" of the experts, the court looked to their training, experience with others who are mentally retarded, and familiarity with the individual and his environment. *Id.* The court also found Dr. Llorente's

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[6] The criticism that the district court erred as a matter of law in "inconsistently" applying the AAMR 9th and 10th editions was never made by the State, likely because no rule on AAMR editions exists in either Texas or the 5th Circuit. *Briseno* itself cites both the AAMR 9th and AAMR 10th almost interchangeably, 135 S.W.3d. at 7-8, as Judge Smith acknowledges. The court in *Briseno* also does not cite either the AAMR 9th or the AAMR 10th for a definition of limitations in adaptive functioning, instead citing the American Association on Mental (AAMD) definition. *Id.* at 7 n. 25 (citing AAMD at 11). This definition, while similar, is not the same as either the AAMR 9th or the AAMR 10th. Further, this Court has never distinguished between the AAMR 9th and the AAMR 10th

Given the absence of any briefing by the parties on this issue, we decline to create a new mandatory methodology in applying the AAMR. Adoption of such a rule would again contravene *Atkins'* mandate to leave the development of standards for weighing mental retardation to the states. *Atkins*, 536 U.S. at 317.

testimony to be more credible than Dr. Mears, especially with respect to evaluation of adaptive functioning, based on the fact that Dr. Llorente spent a great deal more time than Dr. Mears evaluating Moore and interviewing people who knew him:

> On all three criteria, but especially Moore's adaptive functioning, the Court finds Dr. Llorente's testimony and assessment more credible than Dr. Mears's. Dr. Llorente spent seven to eight hours interviewing and evaluating Moore, while Dr. Mears spent only two to two and half hours. Dr. Llorente contacted and interviewed Moore's family members to learn about Moore's childhood, while Dr. Mears did not contact or interview anyone because he thought their opinions were not useful. Instead, Dr. Mears relied exclusively on his comparatively brief interview with Moore and his review of Moore's records. Dr. Llorente administered a large battery of tests to Moore. Dr. Mears also performed some tests on Moore, but not nearly as many.

Id. at 13.

We first address the State's contention that the district court abused its discretion in not considering "other factors" suggested in *Briseno* to help the factfinder distinguish mental retardation from antisocial personality disorder. These factors are: (1) whether those who knew the person best during the developmental stage thought he was mentally retarded at the time, and if so, acted according to that determination; (2) whether the person formulated plans and carried them through; (3) whether the person's conduct showed leadership; (4) whether the person's conduct in response to external stimuli is rational and appropriate, regardless of whether

it is socially acceptable; (5) whether the person responds coherently, rationally, and on point to oral or written questions; (6) whether the person hides facts or lies effectively in his own or others' interests; (7) whether the commission of the offense required forethought, planning, and complex execution of purpose. *Briseno*, 135 S.W.3d at 8. The district court declined to apply these factors for the following reasons: it found that the State did not argue or present evidence that Moore had an antisocial personality disorder that accounted for his adaptive functioning deficiencies; that, even if the argument that Moore suffered from antisocial personality disorder had been raised, there was no evidence to support a finding that such a disorder caused Moore's cognitive and adaptive deficits; that the factors are not part of the AAMR's definition of mental retardation; and that application of the factors is purely discretionary. *Moore*, 2005 WL 1606437 at 5 n.6.

The district court did not abuse its discretion in not explicitly considering the *Briseno* factors, as it found that the State did not present evidence to support a finding that a personality disorder is responsible for Moore's cognitive and adaptive deficits. *Id.* Though the State does point to testimony provided by its experts that Moore displayed symptoms of antisocial personality disorder, we must defer to the district court's determination that any such symptoms did not *cause* his subaverage intellectual and limited adaptive functioning. [7]

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[7] Further, *Briseno* makes clear that the application of the factors is discretionary. *Briseno*, 135 S.W.3d at 8 ("There are, however, some other evidentiary factors which factfinders in the criminal trial context *might also focus upon* in weighing evidence as indicative of mental retardation or of a personality disorder. . .") (emphasis added). Subsequent TCCA cases do not alter this discretionary language. *See Hunter v. State*, 243 S.W.3d 664, 666

Notwithstanding the district court's statement that it would not consider the *Briseno* factors, the transcript of the evidentiary hearing indicates that the court did consider evidence implicating the factors, including the factor that is of particular importance to the State—Moore's role in the crime for which he was convicted. The *district court* specifically asked Dr. Llorente whether his evaluation of Moore's mental retardation would be changed by evidence that Moore was the leader of the crime, and Dr. Llorente responded that it would not. Moore's counsel then followed up by pointing out that in the 1991 assessment of Moore, the report stated that Moore was more likely a follower than a leader, and Dr. Llorente agreed that Moore's mental capacity is such that he would be easily manipulated and influenced by others. Though this discussion is absent in the district court's memorandum opinion, it is clear from the transcript of the hearing that the court considered it.

Evidence pertaining to the other *Briseno* factors also appears throughout the evidentiary hearing. In the hundreds of pages of testimony, the district judge heard: opinions from people who knew Moore during his developmental stage about whether they thought he was mentally retarded; evidence about Moore's functioning at school and at work showing his planning skills and

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(Tex. Crim. App. 2007) ("Other evidentiary factors that fact finders in the criminal-trial context *might also focus upon* in weighing evidence as indicative of mental retardation include. . . "); *Gallo v. State*, 239 S.W.3d 757, 769-70 (Tex. Crim. App. 2007) (same) (emphasis added); *Ex Parte Modden*, 147 S.W.3d 293, 296 (Tex. Crim. App. 2004) ("In *Ex parte Briseno*, we concluded that the criteria in these definitions are subjective, and thus, we set out some additional factors that factfinders *may use*."); *Rosales v. Quarterman*, 291 F.App'x 558, 562 (5th Cir. 2008) (per curiam) (("In *Briseno*, the TCCA also laid out a number of guidelines that courts *can consider* when making mental retardation determinations.") (emphasis added)

response to external stimuli; and evidence about how he responds to oral and written questions. For example, the district court looked at evidence from Moore's school records, and heard from numerous witnesses including teachers, family members, classmates and acquaintances regarding his inability to complete schoolwork and perform other basic tasks until the age of eighteen. The district court also heard testimony that Moore was unable to properly dress himself, could not tie his shoes, consistently scored well below his grade level, and had difficulties learning to speak in sentences and paragraphs, as well as testimony that Moore had difficulties performing basic assignments, and was a follower who was easily tricked as a child. *Moore*, 2005 WL 1606437 at *7-*10. The district court also heard from former co-workers and employers as to deficits in his ability to complete work-related tasks. *Id.* at *11. In addition to testimony and documentary evidence regarding Moore's school and work performance, the district court considered Dr. Llorente's and Dr. Mears' examinations of Moore, which included both oral and written evaluations. *Id.* at *13.

The district court relied on this evidence for its finding that Moore's deficits in adaptive functioning satisfy *Briseno*. The State argues that the district court incorrectly viewed the evidence, arguing, for example, that substantial evidence showed that Moore's academic performance would have improved if he applied himself, that Moore's teachers did not remember his inability to tie his shoes, that he was employed at several jobs and was commended for good performance, and that he communicated and interacted well with his classmates. Where evidence conflicts, however, we must defer to the fact-finder's decision as to which evidence to credit, and we may not simply re-weigh the facts to come to a contrary conclusion. *Anderson*, 470 U.S. at 574. The State

also argues that a determination of mental retardation for the purposes of *Atkins* cannot rest on such subjective factors. However, the *Briseno* court acknowledged that the adaptive behavior criteria are indeed "exceedingly subjective," *Briseno*, 135 S.W.3d at 8, and we are bound to apply the law as set out by the Texas courts.

IV

In arguing that the district court clearly erred, the State essentially relitigates the evidentiary case it presented below. However, the district court was in a better position than this court to judge the credibility of the witnesses who testified on the extent, duration, and causes of Moore's intellectual and adaptive functioning limitations. *See Rivera*, 505 F.3d at 363. Because its findings were not "implausible," they "survive[ ] clear error review." *Id.* Accordingly, we AFFIRM.

JERRY E. SMITH, Circuit Judge, dissenting:

I respectfully dissent. The majority has produced an intellectually sluggish opinion, electing to sweep the district court's legal (and factual) errors under the proverbial rug rather than undertake its responsibility to make sense of Texas's jurisprudence regarding retardation, to apply it rigorously to Eric Moore's case, and to provide guidance. Haphazardly-applied standards of review, casually-read caselaw, and superficially-scrutinized evidence make for an unfortunate combination; here, they result in shallow analysis and the wrong result. The only mitigation is that the majority opinion is unpublished, so it is not binding on anyone or any court.

I. Legal Background.

A. Standard of Review.

The majority's errors run deep, beginning with its exaggeratedly deferential standard of review. Moore was required to show, by a preponderance of the evidence, that he satisfied the test for retardation established by *Ex parte Briseño*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004), and its progeny.[1] But though the district court acts as the finder of fact on the overall question of mental retardation,[2] and though we review its factual findings

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[1] *Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006) (Dennis, J.); *see also Morris v. Dretke*, 413 F.3d 484, 497 (5th Cir. 2005).

[2] *Clark*, 457 F.3d at 444.

for clear error,[3] we apply a *de novo* review of *legal* questions as a necessary means of determining whether the ultimate *factual* question of retardation was decided without reversible error.

The majority fails to acknowledge it, but there is no doubt on that score:

To the extent that errors of state or federal law "influence" the district court's decision, even that court's findings of fact are accorded *no deference whatsoever.*[4] "[A] judgment based on a factual finding derived from an incorrect understanding of substantive law must be reversed,"[5] because incorrect legal conclusions "taint" resulting factual findings.[6] The clearly-erroneous standard of review gives no shelter to a district court's legal errors.

Similarly, the district court cannot immunize its findings from reversal merely by characterizing them as determinations of credibility. *Anderson v. City of*

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[3] *Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007).

[4] *G.M. Trading Corp. v. Comm'r*, 121 F.3d 977, 980 (5th Cir. 1997). Nor is the panel permitted to defer to the district court in its interpretation of Texas's definition of mental retardation. *See Hulin v. Fibreboard Corp.*, 178 F.3d 316, 318 (5th Cir. 1999) (Dennis, J.) (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.")).

[5] *Mobil Exploration & Producing U.S., Inc. v. Cajun Constr. Servs., Inc.*, 45 F.3d 96, 99 (5th Cir. 1995).

[6] *Id.* at 99 n.6 (quoting *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 567 (5th Cir. 1966)).

Bessemer City, 470 U.S. 564, 575 (1985).[7] Nor is the existence of *some* evidence to support the district court's finding sufficient to rule out a determination of clear error entirely. *Id.* at 573.

B. The *Briseño* Test.

After the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), leaving the details of substantive and procedural protections for mentally retarded convicts to the states, the Texas Court of Criminal Appeals ("TCCA") adopted the general diagnostic framework of the American Association on Mental Retardation ("AAMR")[8] that is employed elsewhere in Texas state law. *Briseño*, 135 S.W.3d at 7. The Texas Legislature has taken no action pursuant to *Briseño*,[9] and Texas courts have continued to apply it.

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[7] The *Anderson* Court explained,

> Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Anderson, 470 U.S. at 575.

[8] *See* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (10TH ED. 2002) ("AAMR 10TH").

[9] *Neal v. State*, 256 S.W.3d 264, 270 (Tex. Crim. App. 2008) ("Over four years later, the Texas legislature still has not enacted any legislation on this matter."), *cert. denied*, 129 S. Ct. 1037 (2009).

The AAMR definition is therefore authoritative, at least to the extent that it was incorporated by the *Briseño* court, and subject to any modifications that *Briseño* requires. [10]

The *Briseño* definition of retardation has three parts that the defendant has the burden of proving by a preponderance of the evidence. *Id.* at 12. First, *Briseño* requires that putatively retarded individuals have "'significantly subaverage' general intellectual functioning," "defined as an IQ of about 70 or below (approximately two standard deviations below the mean)."[11] In practice, IQ tests typically are normed to an average IQ defined as 100, with a standard deviation of 15 or 16. AAMR 10th at 60-66 (discussing various IQ tests). Retarded persons are those with IQ's two standard deviations or more below the mean, that is, in the bottom 2-3% of the population as measured by IQ testing.

Second, *Briseño* requires that low IQ be "accompanied by related limitations in adaptive functioning." *Briseño*, 135 S.W.3d at 7 & n.25 (internal quotation marks omitted). "Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age

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[10] *See Briseño*, 135 S.W.3d at 9 & n.30 (noting that the legal definition of retardation 10is different from, though informed by, "psychological diagnostic criteria").

[11] *Id.* at 7 & n.24 (quoting American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (Text Revision, 4th ed. 2000) ("DSM-IV")). *See also* AAMR 10th at 35, 57 (discussing the AAMR 10th threshold IQ score for retardation).

level and cultural group, as determined by clinical assessment and, usually, standardized scales."[12] Third, the defendant's poor IQ and adaptive functioning deficits must have manifested themselves before the age of eighteen. [13]

III. Intellectual Functioning.

The district court concluded that Moore satisfied the first prong of the *Briseño* test by demonstrating an IQ of "about 70" or lower.[14] The court explained that it had two bases for that finding: first, what the court took to be the state's expert's agreement with Moore that Moore's IQ is impaired for purposes of *Briseño*, and second, Moore's history of IQ testing.[15] The court, contrary to the

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[12] *Briseño*, 135 S.W. 3d at 7 n.25 (quoting American Association on Mental Deficiency, CLASSIFICATION IN MENTAL RETARDATION (Grossman ed. 1983)). *See also* AAMR 10th at 41 (defining "adaptive skills" as those abilities "that have been learned by people in order to function in their everyday lives").

[13] *See Briseño*, 135 S.W.3d at 7; AAMR 10th at 1.

[14] *Moore v. Dretke*, No. 603-CV-224, 2005 WL 1606437, at *5 (E.D. Tex. Jul. 1, 2005) (citing AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (9th Ed. 1992) ("AAMR 9th")).

[15] The court stated, in full,

> With a five-point standard error of measurement and both experts agreeing that Moore satisfies this criterion for mental retardation, the Court concludes that Moore has proven by a preponderance of the evidence that he satisfies the AAMR criterion of subaverage intellectual functioning defined as an IQ of "about 70 or below."

Moore v. Dretke, 2005 WL 1606437, at *5.

majority's analysis, committed reversible error on both counts.

A. Dr. Mears's "Agreement."

Moore submitted the expert testimony of Dr. Anatolin Llorente, who administered an IQ test to Moore and testified that Moore's IQ is below the *Briseño* threshold of 70. The state's expert, Dr. Gary Mears, stated on direct examination that, on account of various scoring errors in, and necessary adjustments to, Moore's IQ test scores, his IQ is significantly higher than 70, perhaps even over 80, and in any case not in the retarded range. 3 EH 239.[16] Even before Mears identified flaws in Llorente's testing procedure, he argued in his report that because Llorente's test did not take "cultural factors and educational factors" into account, it critically understated Moore's actual IQ and contributed to Llorente's misdiagnosis.[17] Mears's conclusions, if adopted by the district court, would have precluded a finding of retardation. The colloquy that opened Mears's cross-examination, however, has proven a source of confusion for both the district court and the majority. The panel does not quote the entire relevant dialogue, so I will:

Q. Let's start with IQ testing.

A. Yes, sir.

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[16] I cite the evidentiary hearing transcript in the form "[volume] EH [page]."

[17] Mears was not able to administer an IQ test himself, because Llorente had given one only three months before, 3 EH 216, and a six-month interval is needed for accuracy. *Hall v. State*, 160 S.W.3d 24, 30 n.14 (Tex. Crim. App. 2004).

Q. Can we agree for the purposes of this hearing that Mr. Moore has significant limitations in intellectual functioning, the first prong of the mental retardation definition? That is my question.

A. I agree that he has limitations in intellectual functioning, yes.

Q. Now, do you agree to the extent we can move past that first prong of the mental retardation definition and focus on adaptive deficits?

A. Yes, sir.

Q. So you agree with Dr. Llorente that whether we use the DSM definition or the AAMR definition, the first prong is satisfied in your professional opinion?

A. The prong in terms of--I have some question [sic] about his accuracy of the score, but I would still, nevertheless, because of my opinion about the adaptive functioning, I will accept that.

Q. You do accept that?

A. I will accept it.

Q. Because I don't want to spend half a day talking about it?

A. Right, I will accept it--regardless of the scoring errors. I still will accept it.

> Q. Okay.
>
> [Moore's Attorney]. Your Honor, I hate to rest on that, but I think I need to. I think we have moved past that prong.
>
> THE COURT. All right. Proceed.
>
> Q. I appreciate that, sir.
>
> A. Thank you.
>
> Q. You have helped us move along. . . .

4 EH 3-4. The district court took this exchange as a concession by Mears and concluded that "both experts agree[d] that Moore satisfies" the *Briseño* IQ criterion. *Moore v. Dretke*, 2005 WL 1606437, at *5. The majority characterizes the testimony as "at best ambiguous" and defers to the district court's view.

That is absurd; only one interpretation of Mears's testimony is defensible, and it is not the district court's or the majority's. It makes no sense to suppose that Mears (1) submitted a report asserting that Moore had an IQ well in excess of the ceiling for a retardation diagnosis and attacking the accuracy of Llorente's contrary evidence, (2) testified to that effect at great length on one day of a hearing (even bringing up additional concerns with Llorente's evidence), and (3) then for no apparent reason conceded the issue entirely in the opening moments of his cross-examination, first thing the very next morning. That, however, is exactly what the district court and the majority say.

Neither Moore, nor the district court, nor the majority has posited an explanation for such a dramatic

reversal. Nor can I imagine an explanation that survives a moment of sober reflection on the actual course of the district court proceedings. After eliminating rationalizations too fanciful even for Moore to suggest in his own defense (but which, somehow, satisfy the district court and the majority), what remains is only the conclusion that Mears made no concession at all.

A broader review of the record only bolsters that view. On direct examination, immediately after explaining his objections to the IQ test administered by Llorente, Mears emphasized that even if, hypothetically, Llorente's IQ testing were accepted as accurate, he was "so convinced" that Moore's adaptive functioning far exceeded the level of mentally retarded persons that whether Llorente's IQ testing was adopted would not matter. 3 EH 220.[18] Though the majority chooses to ignore it, that is almost precisely the view Mears repeated to Moore's counsel on cross-examination. Mears's testimony was consistent between direct and cross examination; there was no concession.

Plainly, Mears wished to present two independent bases for rejecting Moore's *Atkins* claim: Because Mears felt that the adaptive-functioning prong was not even a close call in Moore's case, it did not matter what the court

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[18] The majority lamely counters that on direct examination Mears "never clearly states that the scores [qualifying Moore on the IQ prong] are invalid." That is not only irrelevant, but a flat misrepresentation of what happened at the hearing. The state did not need to show that Llorente's test was "invalid," only that it was inaccurate or unreliable, and that is exactly the opinion Mears presented. Relying on Mears's failure use the word "invalid" in describing Llorente's test when he actually *did* testify that it was incorrectly administered and subject to a variety of upward adjustments is no way for the majority to treat a transcript that, read sensibly, provides no support for its opinion.

decided on the IQ issue, so Mears did not, in the words of Moore's counsel, "want to spend half a day talking about it." Mears reserved his objections to Moore's IQ scores, but all parties preferred to focus on Mears's subsequent testimony regarding Moore's adaptive functioning.[19]

This is not a case in which two plausible theories explain the evidence, nor is it a decision concerning a witness's credibility where the panel must accord the district court heightened deference under the clearly-erroneous standard of review. *See Anderson*, 470 U.S. at 574-75. The district court misunderstood the plain words of Mears's testimony. The question is not whether Mears meant what he said, or whether what he said was believable or true; rather, the question is whether he said what he said, and that can be determined by the cold words in the transcript without reference to credibility, inflection, or demeanor.

Notwithstanding the majority's headlong rush to defer to the district court, the "definite and firm conviction that a mistake has been committed" is inescapable. *Id.* at 573. To the extent the court relied on Mears's "agreement" in making its finding on Moore's IQ, that decision "is implausible in the light of the record considered as a whole," *Rivera*, 505 F.3d at 361, and the court committed clear error. That disposes of one of the district court's two bases for finding that Moore's IQ satisfies the requirements of *Briseño*.

B. Moore's IQ.

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[19] The majority, in effect, penalizes the state because its expert cooperated with the court—to the evident gratitude of Moore's counsel—in expediting the hearing by avoiding what the parties perceived as unnecessary discussion.

1. Criteria.

The present panel's next job, in a correct treatment of Moore's case, would have been to identify the Texas state standard for deciding whether Moore's IQ meets the requirements for retardation under *Atkins*. The basic question is whether Texas law treats the IQ of 70 spoken of in *Briseño* and AAMR 10th as a bright-line cutoff point. The majority studiously avoids thinking about that question. But it is impossible to evaluate the district court's finding that Moore's IQ is below the borderline set by *Briseño* without first determining what that borderline *is*, especially considering that the court's factual findings would not be entitled to deference if the standard it applied were wrong. I will therefore fill that hole in the majority's analysis.

The TCCA has left no doubt that an IQ below 70 (or at or below 70) is required for a finding of retardation under *Atkins*.[20] In our post-*Briseño* decisions, this court

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[20] *See, e.g., Williams v. State*, 270 S.W.3d 112, 132 (Tex. Crim. App. 2008) (distinguishing between the defendant's "70 and below IQ scores" and his "70 and above IQ scores"); *Hunter v. State*, 243 S.W.3d 664, 669-71 (Tex. Crim. App. 2007) (noting defense expert's testimony that 70 "is considered the 'cutoff point'"), *cert. denied*, 129 S. Ct. 51 (2008); *Howard v. State*, 153 S.W.3d 382, 386 (Tex. Crim. App. 2004) ("'Significantly subaverage general intellectual functioning' is defined as an IQ of 70 or below."); *see also Neal*, 256 S.W.3d at 272-73 ("significant sub-average general intellectual functioning, usually evidenced by an IQ score below 70"); *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (same). The fact that Texas courts have referred to 70 as a "presumptively retarded score," *see, e.g., Ex parte Taylor*, No. WR-48498-02, 2006 WL 234854, at *3 (Tex. Crim. App. 2006) (per curiam) (unpublished) (Johnson, J. concurring), supports this interpretation.

I acknowledge an otherwise-unsupported statement in *Ex parte Modden*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004), that a

has interpreted the Texas standard in the same way as the TCCA.[21] In no case has a Texas court or the Fifth Circuit found mental retardation for *Atkins* purposes where its best guess as to IQ was above 70.

To be sure, IQ tests have a margin of error, and a person's *actual* IQ may be below 70 even when an IQ test yields a higher score. Both the *Briseño* court and AAMR 10th speak of an IQ measurement in terms of probabilities and acknowledge that, considering the five-point margin of error typical in IQ tests, a diagnosis of retardation is sometimes possible even where a person's IQ is measured to be above 70. *See Briseño*, 135 S.W.3d at 7 n.24; AAMR 10th at 57.

"70-75 score" "generally indicates subaverage general intellectual functioning." That assertion, however, not only is *dictum*--considering that the defendant's IQ had been measured, in two tests, at 58 and 64--but also is contrary to the overwhelming weight of TCCA authority; the statement, to my knowledge, has not been repeated in any later decision.

[21] *See Taylor v. Quarterman*, 498 F.3d 306, 308 (5th Cir. 2007) ("[T]he only IQ test taken of Taylor prior to his turning eighteen yielded a result of 75, above the mild retardation cut off of 70."), *cert. denied*, 128 S. Ct. 1739 (2008); *Woods v. Quarterman*, 493 F.3d 580, 586 (5th Cir. 2007) ("[T]he court noted . . . the existence of four IQ test scores placing Woods above the seventy-point cutoff."); *In re Mathis*, 483 F.3d 395, 397 (5th Cir. 2007) ("Typically, a person's IQ must be measured at 70 or below to qualify as mentally retarded."); *Clark*, 457 F.3d at 445 (stating that IQ of 70 is "the rough cut-off for mental retardation"); *In re Salazar*, 443 F.3d 430, 433 n.1 (5th Cir. 2006) (per curiam) (treating 70 as the "cutoff score" even where an IQ score could have been "adjusted" to below 75). *See also Wilson v. Quarterman*, No. 6:06-CV- 140, 2009 WL 900807, at *5 (E.D. Tex. Mar. 31, 2009) (quoting Texas state trial court findings stating that 70 is "considered the border below which a person is mildly mentally retarded").

Texas caselaw is explicit, though, in holding that an actual IQ between 70 and 75 is not sufficient for a finding of retardation.[22] The *Briseño* petitioner presented scores of 72 and 74 and pointed out that, because of the margin of error, his true IQ could be lower. The TCCA rejected that argument: "[E]ven if a factfinder applied the statistical standard deviation, there is not enough evidence in this record that proves, by a preponderance of evidence, that applicant's true IQ is lower than 72-74 rather than higher than 72-74." *Briseño*, 135 S.W.3d at 14 n.53. If the *Briseño* court had meant to establish an IQ cutoff above 70, or not to establish a cutoff at all, or if it had envisioned simple application of an IQ test's margin of error to the resulting score, it would have had no reason to make this observation; the scores of 72 and 74 would likely have been satisfactory by themselves as a matter of law. The *Briseño* court also expressly questioned the diagnostic usefulness of any margin of error where "the burden of proof is preponderance of the evidence, not a 95% confidence burden." *Briseño*, 135 S.W.3d at 14 n.53.[23]

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[22] *See Neal*, 256 S.W.3d at 273-75 (deferring to jury's finding of no preponderance based on test scores of 70, 72, and 87); *Taylor*, 2006 WL 234854, at *6 (Johnson, J., concurring) (no preponderance based on score of 75); *Ex parte Rodriguez*, 164 S.W.3d 400, 403, 405 (Tex. Crim.App. 2005) (Cochran, J., concurring) (score of 71, according to defense expert, "not in the retarded range"; 70 a "cut-off level").

[23] That makes excellent statistical sense. By definition, even taking the margin of error into account, an average IQ score above 70 cannot by itself prove an IQ of 70 or below by a preponderance of the evidence, for when the center of a confidence interval is higher than 70, the probability that the score is below 70 cannot be above 50 percent. The probability that a subject's true IQ lies above 70 is necessarily above 50 percent; in the absence of other data, that precludes finding an IQ below 70.

The most accurate interpretation of Texas law, then, is that the lodestar of the *Briseño* analysis, as reflected in *Briseño* and its progeny, is an IQ of 70 or below (or, in accordance with some of the cited cases, an IQ below 70), *regardless* of the margin of error. Although IQ *tests* certainly have a margin of error, recognition of that margin merely permits evidence that a defendant's *true* IQ is lower or higher than what was measured.[24] Evidence may show that an IQ measurement between 70 and 75 is inflated, thus permitting a finding of "significantly subaverage general intellectual functioning," just as the opposite may be shown regarding an IQ measured below 70, *Briseño*, 135 S.W.3d at 7 n.24, and courts should be "flexible" in considering such

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[24] *See Briseño*, 135 S.W.3d at 14 n.53; *see also Hunter*, 243 S.W.3d at 669-70; *Taylor*, 24 498 F.3d at 308 ("The administrator of the test thought Taylor was capable of performing better than 75. While Taylor's expert concluded that this test result overstated Taylor's IQ by seven points, the trial court was not unreasonable in finding otherwise."). In *Briseño*, the trial court determined that the most accurate measurements of IQ yielded results of 72 and 74. The TCCA quoted and adopted the trial court's finding that "[t]he preponderance of the evidence does not show that these test scores over-state the actual intellectual functioning of Applicant; the evidence in fact showed that there are good indications that the test scores understated Applicant's intellectual functioning." *Briseño*, 135 S.W.3d at 14.

The decision in *Briseño* therefore reflects a combination of (1) skepticism toward any given IQ measurement and (2) searching for a true IQ measurement at (or maybe below) the threshold of 70. This is consistent with the treatment in AAMR 10th, at 57-59, of variations in IQ measurements and fully explains why some Texas courts, *see, e.g., Neal*, 256S.W.3d at 272-73, state that an IQ score below 70 "usually" satisfied the IQ prong. One way or another, evidentiary flexibility in determining whether a standard is met is not to be confused with the absence of any standard at all. *See Clark*, 457 f.3d at 466 (explaining that Texas courts' "make a flexible determination" of whether a defendant's IQ is above or below 70).

evidence.[25] But without such evidence, 25 an IQ score above 70 is not itself indicative of retardation "merely because the low end of [a defendant's] confidence band [is] below 70." *Clark*, 457 F.3d at 446.[26]

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[25] *See Clark*, 457 F.3d at 444-46. *See also Williams v. Quarterman*, 293 F. App'x 298, 309-10 (5th Cir. 2008) (per curiam) (finding an IQ above 70 where petitioner had tested at 70 or 71 repeatedly, and the district court suspected malingering); *In re Hearn*, 418 F.3d 444, 447 & n.4 (5th Cir. 2005) (considering measurement error in granting permission to file a successive habeas petition based on IQ of 74).

[26] One district judge from the court a *quo* has presented a compelling justification for a bright-line rule.

> Even though IQ testing and evaluation of adaptive limitations involves ranges, the professional organizations and the courts have adopted standards or criteria, which establish a cut-off point. No matter which criteria are chosen, there will be some individuals who are very close to the border of the cutoff—even if only slightly higher. Saying that a Defendant should be classified as mentally retarded simply because he or she is "borderline" would make the cutoff, which is already based on an evaluation of ranges, impossibly vague. There will always be a Defendant who is close to, but just above, the level of the last person found to be mentally retarded who could therefore be termed "borderline." That Defendant would then be in a new "borderline" sub-category of the classification of mentally retarded. The concept of

Not only is the TCCA's directive on this matter plain, but this court has adopted it. In *Clark*, the panel reasoned that "[t]he explanation provided by the [TCCA] in adopting its definition of mental retardation plainly foreclose[d]" the petitioner's claim "that it was error for the state court [not] to find mental retardation where the lowest potential score in the confidence band of the 1983 [IQ] test was below 70." *Clark*, 457 F.3d at 446 (citing *Briseño*, 135 S.W.3d at 7 n.24).

Moore was therefore required to prove that his IQ is below a bright-line cutoff of 70. Such a finding could be made *in spite* of, but not *because* of, IQ measurements above 70.

2. Moore's IQ Scores.

Once the proper standard has been identified, the obvious next issue is whether the district court applied it correctly. Because the majority chooses not to identify that standard, it is unable to do anything much beyond shrugging its shoulders and babbling about clear error. The inescapable answer, however, is No, for reasons of both fact and law.

Moore's IQ has been measured three times. When he was in first grade, his school administered a PMA test that showed his IQ to be 74. In 1991, the prison gave a WAIS-R test that yielded a score of 76. Lastly, Llorente administered a WAIS-III test in 2004 that produced a

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"borderline" would swallow any definition or standard.

Simpson v. Quarterman, No. 1:04-CV-485, 2009 WL 80091, at *15 (E.D. Tex. Jan. 8, 2009).

score of 66.[27]

All three of those test results were called into question at the evidentiary hearing. The PMA score, for example, is only a number; there is no evidence that it was properly scored or whether it was administered individually, as the test protocol requires, or to an entire school class. 3 EH 41-45. The vocabulary section of the WAIS-R, according to Llorente, was improperly scored, and in a way that may have slightly inflated the score.[28] Llorente also testified concerning the "Flynn Effect," the apparent increase in the average IQ scores in populations over time, as measured by a given IQ test. Because the WAIS-R was an older test when it was administered to Moore, Llorente suggested adjusting Moore's score of 76

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[27] The majority notes that Llorente also administered a TONI-2 test that showed an IQ of 60, but even Llorente seems not to have considered that test to be a measure of general intelligence. His conclusion reflects the standard professional view of the TONI-2. *See, e.g., Hall v. Quarterman*, 534 F.3d 365, 376 (5th Cir. 2008). In any event, though the district courtmentioned that score, it did not rely on it. *See Moore v. Dretke*, 2005 WL 1606437, at *4-*5.

[28] The WAIS-R verbal section includes a series of progressively more difficult vocabulary questions. Test subjects are asked to define the fourth word in a list, with full credit assumed on the first three. But if the subject receives no credit on any one of questions 4 through 8, the administrator is required to ask and score questions 1 through 3. Petitioner Exhibit ("Pet. Ex.") 13. Moore received no credit on question 7, "fabric" (he evidently answered "clothes"), but the administrator did not score questions 1 through 3, "bed," "ship," and "penny," to confirm that Moore knew the words. Respondent Exhibit ("Res. Ex.") 7 at 33; 2 EH 171-74. This may have inflated the score, perhaps by "one or two points." 2 EH 174. Moore answered "ship" and "penny" correctly on the WAIS-III test that Llorente administered in 2004, but Llorente said one cannot assume that Moore would have known the terms in 1991. 3 EH 52-55.

downward by about four points. 2 EH 175-78.[29]

Mears urged adjusting Moore's score on the WAIS-R upward by as much as ten points to take Moore's lack of education into account. 3 EH 239. Mears also stated that the decline in Moore's measured IQ between the WAIS-R and the WAIS-III could be accounted for by Moore's age, observing that though Moore's verbal score stayed essentially constant, a decrease in his math score (in which abilities naturally decline with age) drove his second score down. 3 EH 246-49. Llorente made no attempt to correct for Moore's age or educational level, despite the fact that Moore is well outside the demographic group to which the WAIS-III is normally applied. 3 EH 68-71, 228-30.

Mears also noted an error in Llorente's scoring methodology. Llorente, it appears, administered vocabulary questions to Moore until Moore missed a total of six. According to Mears, however, the WAIS-III requires the administrator to ask questions until the subject misses six consecutive questions, and Moore had missed only four in a row when Llorente stopped. In effect, Llorente administered a partial test; we cannot

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[29] The Flynn Effect "has not been accepted in this Circuit as scientifically valid." *Mathis*, 483 F.3d at 398 n.1 (citing *Salazar*, 443 F.3d at 433 n.1). More importantly for our purposes, it is not evident whether Texas courts would permit consideration of the Flynn Effect. *Neal*, 256 S.W.3d at 273 ("We have previously refrained from applying the Flynn Effect, noting that it is an 'unexamined scientific concept' that does not provide a reliable basis for concluding that an appellant has significant sub-average general intellectual functioning.") (quoting *Blue*, 230 S.W.3d at 166 ("This Court has never specifically addressed the scientific validity of the Flynn Effect. Nor will we attempt to do so now.")). Even if both of Llorente's adjustments to the WAIS-R were adopted, the test would still yield a measurement of 72, above the Texas threshold.

know what would have happened to Moore's score if Llorente had asked the next two questions. 3 EH 216-18.

Instead of grappling with those conflicting upward and downward adjustments, the district court gave the three scores equal weight, averaged them, reached an IQ of 72, applied the "five-point standard error of measurement," and therefore concluded that Moore had borne his burden of proof. It is that finding, and the district court's actual reasoning in making it, that the panel must consider, and yet the majority refuses to address it at anything resembling an acceptable level of detail.

3. Errors.

To begin with, the district court's IQ decision is not insulated by an evaluation of credibility. The court stated, in the context of its findings on Moore's adaptive functioning, that it found Llorente more credible than Mears "[o]n all three criteria, but especially on Moore's adaptive functioning[.]" *Moore v. Dretke*, 2005 WL 1606437, at *13.[30] In explaining its credibility finding, the court made no mention of the experts' IQ-related testimony but instead pointed to other aspects of their evaluation of Moore.

That finding, additionally, had no apparent effect on the district court's reasoning with regard to Moore's

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[30] It is puzzling that the court could find one expert more credible than the other on the third element–onset before age eighteen–because both parties and, as the district court noted, *Moore v. Dretke*, 2005 WL 1606437, at *15, both experts agreed that that element of the retardation test was met. Apparently the district court was intent on painting with a broad brush the fact that it liked Llorente's testimony better than Mears's.

IQ. By averaging the IQ scores, the court declined to give additional weight to the test administered by Llorente. The court did not evaluate the upward and downward adjustments proposed by either expert and, in effect, treated them as a wash; it certainly did not say that it gave Llorente's proposed adjustments any more credence than Mears's.[31] Though the district court certainly could have relied entirely on Llorente's testimony and concluded that Moore's IQ is 66, it chose not to. The court decided that Moore satisfied the IQ prong of its analysis not because it preferred Llorente's testimony to Mears's but because it mistakenly believed the experts to be in agreement. This panel therefore, in evaluating Moore's IQ, need not give the court's decision on this matter the special degree of deference that we accord findings involving credibility. *Anderson*, 470 U.S. at 575.

The district court's conclusion cannot survive a substantive review less slavishly deferential than the majority's. For one thing, there is no legal or record support for taking an average of Moore's IQ scores. Averaging IQ scores is, to say the least, a creative approach to their analysis and comparison and is highly unusual. Neither expert suggested, employed, or endorsed it.[32] The district court assumed, without any evident backing, that averaging is a meaningful way to compare

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[31] The district court did discount the state's argument that Moore was malingering on the test administered by Llorente, but Mears (contrary to the statement in the court's memorandum opinion) did not express that view himself, so that conclusion did not entail a credibility assessment as between the two experts.

[32] The majority's statement to the contrary has no basis in the record. Reading support for averaging IQ scores into Llorente's testimony about the "consistency" of Moore's three IQ scores, as the majority tries to do, merely distorts the hearing testimony transcript with wishful thinking.

scores from different IQ testing protocols administered years apart and that the margin of error was the same for all three and was the same after the averaging as before. All of those assumptions are facially implausible, and the district court had no apparent reason to think any of them is correct.

Nor is there any precedent supporting such a move. When faced with a variety of IQ test results, courts instead (1) identify the single most reliable result,[33] (2) narrow the results to a probable IQ range above or below 70,[34] or (3) treat the IQ testing results as a wash that precludes a finding of retardation.[35] All these approaches are preferable to just taking an average, especially considering that all three of the IQ scores are of doubtful reliability.[36] The district court, in effect, made up its psychiatric testing methodologies as it went along, and the majority is compliant.

Granting, though, that the district court's best guess as to Moore's IQ was 72, the district court's finding that Moore satisfied the IQ prong of *Briseño* collapses entirely. If Moore's average IQ of 72 is his true IQ, then

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[33] *See Rivera*, 505 F.3d at 361-62; *Taylor*, 2006 WL 234854, at *6 (Johnson, J., concurring).

[34] *See Briseño*, 135 S.W.3d at 14 & n.53; *see also Clark*, 457 F.3d at 445-46.

[35] *See Blue*, 230 S.W.3d at 165-66 (stating that where the defendant suggests adjusting a "partial" score, above 70, to below 70, "we will simply regard the record as . . . devoid of any reliable IQ score"); *Lewis v. Quarterman*, 541 F.3d 280, 284 (5th Cir. 2008); *see also Howard*, 153 S.W.3d at 387.

[36] Under such circumstances, even Moore's counsel, at oral argument, conceded that the results must be "weighed."

as a matter of law he is not retarded for purposes of *Briseño* and *Atkins*. Moreover, the fact that the district court found, based on the IQ evidence described, that Moore demonstrated "an IQ of 'about 70 or below'" suggests that the district court failed to recognize Texas's bright-line cutoff point correctly. As discussed above, Texas requires a finding of an IQ of 70 or below (or perhaps, in accordance with some cases, below 70). The district court committed reversible legal error if it operated on any other understanding of Texas law or reached a conclusion contrary to it.

If, on the other hand, the district court correctly understood the IQ cutoff point, the only way Moore's average IQ could have justified a finding of retardation is if the court relied on extrinsic evidence as to Moore's IQ that would have pointed to a lower result, for example, by showing that his scores were inflated or that the higher scores were entitled to less evidentiary weight. *Cf. Rivera*, 505 F.3d at 361-62. But the district court did no such thing. Instead, it seems just to have relied on the fact that IQ tests typically have a five-point margin of error. As explained above, if the court really did drag its best guess as to Moore's IQ score below the 70-point threshold by applying the margin of error —and nothing in its reasoning suggests a more generous reading—it did so contrary not only to Texas law but also to this circuit's precedent.

That makes no difference to the majority, which refers to the district court's "accounting for [the tests'] margins of error" without blinking, and evidently with a straight face. The majority is utterly silent, in fact, on the district court's failure to apply the *Briseño* IQ cutoff point properly. Instead, it makes a last-ditch effort to salvage the district court's decision by relying on the superficially comforting fact that, according to Llorente, Moore's three

IQ scores were "consistent."

But the fact that three IQ scores, two above 70 and one below, may be "consistent" tells us nothing about whether Moore's IQ is above or below 70, the question the court was bound to answer. After all, Mears testified that the scores were consistent as well, and the thrust of his testimony was the opposite of Llorente's. The district court was still obligated to determine whether the high or the low end of the resulting range was most accurate, but it did not.[37] The majority is without justification in ignoring that failure.

C. Summary Regarding IQ.

The district court applied an incorrect standard of law and misinterpreted the factual evidence in stating that Moore meets the IQ prong of the *Briseño* test. If Moore's IQ is above 70, his claim for relief under *Atkins* must fail. While IQ tests have a margin of error, the law compels the district court to determine its *effect*; it makes no difference standing alone. Though the court may have been entitled merely to credit Llorente's testimony and accept the IQ test he administered, it chose not to. The majority seeks to avoid reaching those conclusions by hiding behind the standard of review, but the majority cannot disguise its abdication of its responsibility to judge the district court's findings. The most charitable remedy for the district court's errors is to remand for that court to hear Moore's evidence again in light of the correct standards. That would require a new evidentiary hearing

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[37] Even if, viewing its words most loosely, it decided that Moore's IQ was at the low end of the confidence interval based on the experts' supposed agreement that Moore had satisfied the first *Briseño* prong, the court's conclusion would still fail, because, as explained above, there was no such agreement.

at which testimony, expert or otherwise, can be given and interpreted under a correct understanding of the law.

Such a forgiving outcome is by no means required, however. The panel is entirely justified in reversing the district court altogether, rendering judgment for the state, and submitting Moore to the punishment duly imposed on him. Moore had the burden all along of showing that he met the IQ prong of the *Briseño* test. Despite ample opportunity to present evidence, he failed to present a single complete IQ score on his own behalf. As I have explained, Llorente appears to have misadministered the WAIS-III in such a way that there is no telling how much higher Moore's score would have been if correctly measured, and Texas courts and this court have repeatedly endorsed a hard denial of relief under such circumstances.[38] For Moore to receive the relief he seeks, on the evidence he presented, is nothing short of a windfall.

None of the district court's bases for finding in Moore's favor on the first *Briseño* factor withstands scrutiny, nor do any of the majority's justifications for affirming. All that remains is the majority's craven refusal to confront and rectify the errors presented to it.

IV. Adaptive Functioning.

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[38] *See Blue*, 230 S.W.3d at 165-66 (stating that where the defendant suggests adjusting a "partial" score, above 70, to below 70, "we will simply regard the record as . . . devoid of any reliable IQ score"); *Lewis v. Quarterman*, 541 F.3d 280, 284 (5th Cir. 2008); *see also Howard*, 153 S.W.3d at 387. *See also Williams*, 293 F. App'x at 311 ("Because Williams carries the burden of proving mental retardation, failure to prove the first *Briseño* prong should end our inquiry.").

Even if Moore's IQ were sufficiently low under the *Briseño* test, he still has the burden to show the necessary deficits in adaptive functioning, the issue that (thanks partly to Mears's generous cooperation with Moore's counsel) took up the bulk of the *Atkins* hearing. Besides the respective experts, Moore relied primarily on the testimony of family members and acquaintances from his youth; the state, on Moore's former teachers and prison guards. The court, after helpfully condensing the relevant evidence and testimony into a veritable biography of the petitioner, concluded that Moore suffered from significant deficits in adaptive functioning. Even giving due deference to the court's determinations of fact and credibility, it erred as a matter of law.

A. Criteria.

Once again, the majority takes no interest in the criteria for reviewing the district court's findings. But just as was the case with the IQ analysis, it is impossible to evaluate the district court's opinion without understanding the adaptive functioning framework. Again, I explicate that standard and demonstrate the district court's serious errors in applying it. AAMR 10th discusses adaptive behavior in terms "conceptual, social, and practical adaptive skills"[39] and requires that an

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[39] AAMR 10th provides examples of "representative skills" within these categories. Under conceptual skills, the AAMR lists "language (receptive and expressive)," "reading and writing," "money concepts," and "self-direction;" under social skills, "interpersonal," "responsibility," "self-esteem," "gullibility (likelihood of being tricked or manipulated)," "naivete," "follows rules," "obeys laws," and "avoids victimization;" under practical skills, "activities of daily living," "instrumental activities of daily living," "occupational skills," and "maintains safe environment."AAMR 10th at 42.

individual have significant deficits (placing him two standard deviations or more below normal) in at least one of those three categories. AAMR 10th at 73. But as explained in AAMR 10th at 81-82, the previous edition, which is AAMR 9th, employed a much different approach, dividing adaptive functioning into ten categories—communication, functional academics, self-direction, health and safety, social skills, leisure, self-care, home living, community use, and work—and requires significant deficits in two of those categories.

AAMR 9th was current at the time of *Atkins*.[40] AAMR 10th was current at the time of *Briseño*, when the general AAMR framework was incorporated into Texas law.[41] At first glance, then, it might seem most appropriate to require that adaptive functioning be analyzed under the AAMR 10th framework.[42] But the *Briseño* court cited both editions[43] and never specified which adaptive-functioning test to use. In practice, other Texas courts, as well, have often referred to AAMR 9th.[44] This court has typically followed whichever edition was

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[40] *See Atkins*, 536 U.S. at 308 n.3.

[41] *See Briseño*, 135 S.W.3d at 8 n.29.

[42] *See ex parte Chester*, No. AP-75037, 2007 WL 602607, at *1 & n.9 (Tex. Crim. App. Feb. 28, 2007) (unpublished) (interpreting *Briseño* as requiring "significant deficits in adaptive functioning, usually expressed by limited conceptual, social, and adaptive skills").

[43] *See generally Briseño*, 135 S.W.3d at 7-8.

[44] *See Modden*, 147 S.W.3d at 295-96 & n.9 (quoting and attributing to *Briseño* the AAMR 9th standard).

used by the parties and experts.[45] So have the district courts in this circuit.[46] That approach is intuitively obvious, for it permits use of two comparably valid frameworks while guaranteeing that district courts will always have the necessary expert guidance in applying them.

In this case, confusingly, AAMR 9th and AAMR 10th were used inconsistently during Moore's hearing. Mears's report, though it never mentions either edition specifically, plainly follows the AAMR 9th standards. The categories of adaptive functioning he lists, and the two-category deficit requirement he mentions, are those of AAMR 9th. Res. Ex. 8 at 3. Mears's direct examination, moreover, was structured around the AAMR 9th categories. 3 EH 250-57.

Llorente's report and testimony are less explicit but inescapably lead to the same conclusion. After opining, in his report, that Moore had difficulties in his general academics and "vocational history," Llorente segued into a discussion of additional fields of adaptive functioning—"social skills," "daily living skills," "other adaptive areas"—with the phrase "[a]s if these two factors

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[45] *See Williams*, 293 F. App'x, at 311-12 (AAMR 9th); *Rivera*, 505 F.3d at 357 (same); *Woods*, 493 F.3d at 585 (same); *Morris*, 413 F.3d at 487-88 & n.1 (AAMR 10th).

[46] *See Simpson*, 2009 WL 80091, at *12; *Rivera v. Dretke*, No. B-03-139, 2006 WL 870927, at *10 (S.D. Tex. Mar. 31, 2006) ("[T]his Court will utilize the 1992 AAMR criteria [*i.e.*, AAMR 9th] . . . because it is the definition that has been endorsed by prior courts and because it is the definition upon which both sides agree, despite the fact that Petitioner discusses both definitions without advancing one over the other.") (same), *aff'd in part, vacated in part*, 505 F.3d 349 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 176 (2008).

were not enough." Not only are these categories essentially those of AAMR 9th, but Llorente's presentation demonstrates that he was looking for deficits in two or more specific areas of adaptive functioning, as AAMR 9th requires, rather than in one of AAMR 10th's broad categories. Pet. Ex. 1 at 11.

Furthermore, when explaining adaptive functioning at the hearing, Llorente mentioned the categories of "social skills, communications, self-care, and those types of skills where an individual requires to be able to disengage his responsibilities in his society." 2 EH 183. These are categories of the AAMR 9th framework and do not resemble the AAMR 10th's three-part standard. At no time did Llorente specify a limitation in conceptual, social, or practical adaptive functioning; he consistently spoke of multiple, specific areas of adaptive functioning and said that Moore was limited in a variety of them.

Moore, however, argued to the district court that the AAMR 10th standard was applicable, 2 EH 17, and he entered excerpts from AAMR 10th into evidence, Pet. Ex. 7. Moore's counsel, while cross-examining Mears, moved freely between the paradigms of the two editions.[47] The court ultimately used the AAMR 10th three-part framework. For all its detailed reasoning and close examination of the evidence, the court thus failed to make its factual findings consistently with the standards

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[47] 4 EH 44-47 (questioning Mears on Moore's "self-esteem," "gullibility," obedience to law, "ability to avoid victimization," and "occupational skills," all listed in AAMR 10th as "skills" relevant to social adaptive functioning); 4 EH 52-56 (questioning Mears on Moore's "academic functioning"); 4 EH 60 ("I have got before you . . . the three broad categories from the AAMR. I am going to start and look at conceptual.").

laid out in the expert testimony.

A few examples will demonstrate how far adrift that failure led the district court. Though AAMR 10th gives some indication of how its standard relates to AAMR 9th's categories and provides "representative skills" relevant to conceptual, social, and practical adaptive functioning, *see* AAMR 10th at 82 Table 5.2, its guidance is hardly self-explanatory. Llorente's report, at its most definite point, finds that Moore has deficits in academics, social skills, vocational history, and daily living skills.

"Functional academics," though, is only one of four AAMR 9th categories that the AAMR 10th table connects to conceptual adaptive skills, and it has no obvious counterpart among the AAMR 10th representative skills. "Social skills" is one of two AAMR 9th categories related to social adaptive skills, but there is no indication whether AAMR 10th and AAMR 9th use the terms identically. "Activities of daily living" is a representative skill area within practical adaptive skills in AAMR 10th (an area in which the court did not find significant limitations), but "self care," "home living," and "work" are three of the five AAMR 9th categories grouped under that new rubric. AAMR 10th gives no indication as to how deficits in AAMR 9th areas translate to the three-category framework.

At the same time, when the court considered the AAMR 10th representative skills (e.g., money concepts, obeying laws, avoiding victimization)—categories not mentioned in AAMR 9th—it did so essentially blind, not having heard experts explain those examples or how they fit into the all-embracing fields of adaptive functioning. One might put this still more starkly: No expert testified in support of the district court's finding that Moore

exhibits significant deficits in conceptual and social adaptive skills.

That is error that infects all the district court's factual findings concerning adaptive functioning. Consider, for example, the court's extensive treatment of Moore's academic history, a subject much discussed by both experts. Those data, under AAMR 9th, might plausibly be pigeonholed under "functional academics," as Llorente did in his report. But the nearest equivalent in AAMR 10th is "conceptual skills," a category including such representative skills as "language" and "reading and writing." AAMR 10th gives no indication—and the experts had no occasion to explain—how Moore's grades in math, history, and science (for example) relate to his adaptive functioning under the framework the court employed.

The court also based its finding that Moore exhibits significant deficits in conceptual adaptive functioning largely on what it took to be his lifelong difficulty learning new skills (e.g., tying shoes, following directions, performing physical work in unison with others, riding a bicycle, driving a car).[48] None of that has anything to do with the other two skills "representative" of conceptual adaptive functioning, "money concepts" and "self-direction." The district court's use of the expert testimony in the context of AAMR 10th was therefore largely guesswork, uninformed by expert guidance. Because the witnesses spoke in terms of AAMR 9th, the categories of which map onto the AAMR 10th framework imperfectly, the court's evaluation of Moore's adaptive

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[48] The court counted many of these difficulties a second time in the context of Moore's practical adaptive functioning, as to which the court did not find a significant deficit.

functioning is inherently flawed.

The majority does not even acknowledge this confusion, much less suggest any means of rectifying it. Plainly, though, no matter how deferential the standard or review may be, the difference between the two AAMR frameworks makes it impossible for the panel to evaluate whether the court properly applied evidence marshaled for AAMR 9th purposes to the AAMR 10th framework.[49]

The district court had no idea what it was doing in this regard. I cannot tell whether the court guessed right, and neither can the majority. The difference is that I find the prospect of the blind leading the blind in a death penalty case disturbing enough to avoid, while the majority cheerfully accepts it. Because of the absence of expert testimony, the review the majority applies is no review at all—little more than a rubber stamp. Whether

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[49] In *Williams*, the TCCA reviewed and rejected a defendant's appeal from a jury verdict rejecting his *Atkins* claim in which, although an expert referred to the AAMR 9th categories, the jury was instructed on the AAMR 10th categories. In that case, however, the TCCA opined that the jury could have based its conclusions on grounds other than adaptive functioning—for example, the defendant's IQ—and in any case the standard of review applied to the verdict was far more deferential than is the clear error review here. *Williams*, 270 S.W.3d at 132 (evaluating whether the verdict was "so against the great weight and preponderance of the evidence as to be manifestly unjust").

In *Gallo v. State*, 239 S.W.3d 757, 778 (Tex. Crim. App. 2007), *cert. denied*, 128 S. Ct. 2872 (2008), the TCCA permitted a jury instruction defining "adaptive behavior" as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group" instead of enumerating the categories. (The experts had used the AAMR 9th approach.) But that is merely the definition found in § 591.003 of the Texas Health and Safety Code, which the *Briseño* court largely incorporated. *Briseño*, 135 S.W.3d at 7 n.25.

the majority's reticence flows from an exaggerated conception of the ability of generalist jurists to consider technical information themselves, a stunted reliance on the standard of review, or mere inattention, I do not know. Regardless, it is obvious that what the panel ought to have done (if it reached Moore's adaptive functioning at all) is decline to review the district court's findings and remand for evaluation of the evidence consistently with the expert testimony that may be elicited in a further hearing.

B. The Additional *Briseño* Factors.

The *Briseño* court, 135 S.W.3d at 7 n.25, 8, acknowledged that the criteria for adaptive functioning are "exceedingly subjective" and encouraged the use of standardized tests for their evaluation. The court, *id.* at 8, also suggested a number of "other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder":

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

- Has the person formulated plans and carried them through or is his conduct impulsive?

- Does his conduct show leadership or does it show that he is led around by others?

- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

- Can the person hide facts or lie effectively in his own or others' interests?

- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id. at 8-9. 50[50]

The district court acknowledged the existence of the *Briseño* factors but refused to consider their substantive application. Explaining that decision, the court interpreted *Briseño* as saying that the factors would apply only in those *Atkins* cases in which a court must decide whether a defendant is retarded or has a personality disorder. Because it did not understand the state to have argued, or presented any evidence, that Moore had such a disorder, the court considered the factors to be legally and factually irrelevant. It also said that it did not have to consider any factors not part of the AAMR test, and, lastly, it relied on the factors' being discretionary. For these reasons, it chose not to take any of the *Briseño* factors into account. *Moore v. Dretke*, 2005 WL 1606437, at *5 n.6.

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[50] The *Briseño* court evidently expected that these factors, being intuitively simple and nontechnical, would be helpful to courts in sorting out contradictory expert testimony concerning the "exceedingly subjective" criteria for adaptive functioning in close cases. *Briseño*, 135 S.W.3d at 8.

The majority happily endorses the district court's conclusion, failing to recognize that none of those reasons is an adequate ground for refusing to consider the *Briseño* factors. All, in fact, contain errors of law or clearly erroneous findings of fact,[51] or at the very least indicate the court's refusal to consider "relevant factor[s] that should have been given significant weight."[52] The court's choice to disregard the *Briseño* factors is an abuse of discretion almost by definition.

To begin with, the fact that the AAMR does not mention those seven factors does not exclude their applicability in Texas law; the *Briseño* test supersedes the AAMR and is the law that controls here.[53] The TCCA

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[51] *Ratliff v. Stewart*, 508 F.3d 225, 229 (5th Cir. 2007) (internal quotation marks omitted); *see also Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2004); *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995).

[52] *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 n.4 (5th Cir. 2008) (en banc) (quoting 52 *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)), *cert. denied*, 129 S. Ct. 1336 (2009). *See also Dell Computer Corp. v. Rodriguez*, 390 F.3d 377, 385 n.14 (5th Cir. 2004) ("Thus, 'when judicial action is taken in a discretionary matter,' that action may be set aside by a reviewing court if 'it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'") (quoting *United States v. Walker*, 772 F.2d 1172, 1176 n.9 (5th Cir. 1985)).

[53] *See Modden*, 147 S.W.3d at 299-300 ("[T]his Court in *Ex parte Briseño* adopted the [AAMR] criteria . . . and some other evidentiary factors in addressing *Atkins* mental retardation claims.") (citation omitted) (Henry, J., dissenting); *see also Mathis*, 483 F.3d at 397 (stating that retardation depends on the AAMR definition "and associated factors" established by *Briseño*); *Clark*, 457 F.3d at 445 ("Although the Court [in *Atkins*] did refer to the clinical definitions of mental retardation promulgated by the AAMR . . . it did not dictate that the approach and the analysis of the State inquiry

can modify the AAMR definition at its discretion, and in *Briseño* it did so. The district court was wrong as a matter of law to ignore Texas state courts in this way.

The court also erred as a matter of law in saying that those factors are inapplicable where personality disorders are not at issue. *Briseño* did involve a defendant who claimed to be retarded and who the state said merely suffered from a personality disorder. Other courts have used the *Briseño* factors to make a similar distinction.[54] But the TCCA has understood or described the *Briseño* factors as being applicable in all cases,[55] and so has this court.[56] Whether the state argued or presented evidence related to personality disorders is therefore irrelevant to the factors' applicability.

The district court's reliance on a legally erroneous understanding of the *Briseño* factors' scope of application constitutes an abuse of discretion and is reversible. Even if, "*arguendo* (and *dubitante*),"[57] *Briseño* did limit the application of those factors to cases in which a personality disorder is presented as an alternative to a

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must track the approach of the AAMR . . . exactly.").

[54] *See, e.g., Williams*, 293 F. App'x at 312..

[55] *See, e.g., Hunter*, 243 S.W.3d at 666-67; *Gallo*, 239 S.W.3d at 769-70; *Modden*, 147 55 S.W.3d at 296 & n.12.

[56] *See, e.g., Rosales v. Quarterman*, 291 F. App'x 558, 562 (5th Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 1317 (2009)) ("In *Briseño*, the TCCA also laid out a number of guidelines that courts can consider when making mental retardation determinations.").

[57] *Puckett v. United States*, 129 S. Ct. 1423, 1431 (2009).

diagnosis of retardation, the district court was plainly incorrect in saying that the state had not argued or presented evidence that Moore's adaptive functioning deficits may be caused by such a disorder. On both direct and cross-examination, Mears consistently suggested an "antisocial" personality as an alternative explanation to mental retardation.[58] That is essentially identical to the circumstances of *Briseño*, in which "the State's expert found no mental retardation but did find evidence consistent with antisocial personality disorder." *Briseño*, 135 S.W.3d at 13.

More importantly still, the district court's statement that "there is no evidence to support a finding that a personality disorder is responsible for Moore's cognitive and adaptive deficits," *Moore v. Dretke*, 2005 WL 1606437, at *5, is belied by the court's own analysis of Moore's social adaptive functioning, which deals extensively with Moore's disruptive behavior in school, social isolation, violence, and strained family relationships. Considering that both the state and the court's factual findings invited consideration of whether Moore has an antisocial personality, the district court should have considered the factors set out in *Briseño* for

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[58] 3 EH 223 (stating that Moore's adaptive problems are caused by antisocial tendencies, not adaptive problems in the retardation sense); 3 EH 252 (explaining that Moore is not retarded but rather is "more on the antisocial spectrum"); 4 EH 41 (distinguishing between adaptive functioning for purposes of retardation and diagnosis of antisocial personality); 4 EH 55-56 ("I think he has does have some learning disabilities [as distinguished from retardation]. . . . [The significance of a child's academic problems] depends on if the child is antisocial. . . .He may not have been motivated."); 4 EH 63-64 (state's attorney questioning Mears on the difference between "problem" or "antisocial" behavior and adaptive deficit; poor performance in school not an adaptation issue if it derives from antisocial tendencies or poor motivation)).

just that purpose. In short, the court's rejection of the *Briseño* factors was "based on an erroneous view" of the law–its impression that the factors are not applicable at all–and also on a "clearly erroneous assessment of the evidence"--its failure to recognize relevant evidence at the hearing.

After one rejects the district court's first reasons for ignoring the *Briseño* factors, all that remains is the court's naked reliance on the factors' being discretionary. That, standing by itself, is not an acceptable basis for refusing to consider them. Though the TCCA has described the factors in discretionary terms, there is no Texas case in the years since *Briseño* in which the court, in the way the district court acted here, explicitly refused to consider the factors.

In fact, a review of post-*Briseño* cases shows that where Texas trial judges rather than juries make the *Briseño* analysis, they consistently—perhaps invariably—consider some or all of these factors, and the TCCA, after *Briseño*, has used almost mandatory language in describing them.[59] This court, moreover, has referred to

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[59] *See Modden*, 147 S.W.3d at 297 ("[T]he trial court did not use the *Briseño* factors in its findings because it did not have the benefit of our order in that case. Nonetheless, we conclude that the trial court's findings are supported by the record."); *Ex parte Elizalde*, No. WR-48957-02, 2006 WL 235036, at *3 (Tex. Crim. App. Jan. 30, 2006) (unpublished) (Johnson, J., concurring) ("In *Briseño*, this Court examined seven factors to gauge the level of an individual's adaptive functioning. However, applicant provides no evidence . . . to address any of the factors outlined in *Briseño*."). *See also Gallo*, 239 S.W.3d at 777 ("The ultimate issue of whether a defendant is mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon *all* of the evidence and determinations of credibility.").

the factors as "correct definitions of mental retardation" for purposes of the governing Texas law. *Moreno v. Dretke*, 450 F.3d 158, 164 (5th Cir. 2006). Evidence relevant to the factors was elicited in both the state trial and the federal evidentiary hearing, and all seven appear at least relevant to Moore's case.[60] Considering the factors' obvious centrality to the *Briseño* test and relevance to this case, together with the absence of any justification for ignoring them, the district court's choice was mere caprice—in other words, an abuse of discretion.

The district court *had no legally cognizable reason* for ignoring the *Briseño* factors, and the majority appears to recognize the precariousness of the district court's refusal to address the evidence as the TCCA intended. The majority's effort to justify that refusal, however, is nothing short of sophistic.

The majority completely disregards the district court's mistaken legal understanding of the factors' applicability. The majority does recognize the volume of evidence before the district court that was related to the factors, but the majority does not seem to understand

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[60] In fact, the district court and the majority resolutely ignore the unmistakable fact that all seven of the *Briseño* factors likely weigh against Moore. The adults who knew him when he was a child were fairly unanimous that while they regarded him as mentally subaverage, they never thought he was retarded. Moore's role in his crime—including the ruse it involved and the manner in which Moore duped his co-defendants out of the proceeds and tried to shift responsibility for the victim's death—undeniably indicates a capacity for planning, leadership, and subterfuge. There was no indication that his conduct has ever been irrational. He answers questions directly and coherently, as evidenced by his interviews with Llorente, Mears, and the police after his arrest; no testimony suggested otherwise. Merely to affirm the district court bespeaks a refusal to confront that contrary evidence and its legal implications.

how badly that cuts against its conclusion.[61] If there was so much evidence relevant to the factors, after all, the district court's reliance on the supposed *lack* of relevant evidence looks especially weak. Instead, the majority brazenly pretends that the district court considered the factors "implicitly."[62]

That is pure fiction. For all its elaborate deference to the district court elsewhere in its shaky opinion, the majority fails to take the district court at its word in one of its most unambiguous statements, namely: "This Court will not analyze these factors for four reasons[.]" The only acceptable reading of that language is that the district court *did not analyze those factors*. Because all of the district court's reasons are legally inadequate, there is no sense at all in the majority's concocting imaginary factual findings to which to defer.

The great irony in the majority's treatment of the evidence relevant to the *Briseño* factors is that though the majority happily endorses the district court's application of that evidence to technical psychiatric criteria that it did not understand, the majority refuses to censure the district court for failing to apply the evidence to criteria, created for judicial use, that are critical under state law. The majority has elected to

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[61] Nor does the majority convincingly explain the fact that district court made absolutely no reference, in its opinion, to the sophistication of Moore's leadership role in the murder, one of the main elements of the state's argument regarding adaptive functioning. 3 EH 7-11.

[62] For example, the majority reads the district court as actually deciding that Moore's antisocial tendencies "did not *cause* his" adaptive deficits and that Moore's role in the crime he committed did not affect its judgment.

rewrite an indefensible district court decision rather than review it on its own merits.

IV. Conclusion.

In light of the record and the applicable law, the district court committed both legal and factual reversible errors in finding that Moore is retarded, for *Atkins* purposes, under Texas law. A clear-headed evaluation of the evidence in light of the correct legal standards undeniably poses a more difficult obstacle for Moore than the one he actually faced, considering his history of IQ testing and the weight of the *Briseño* factors. Because of the majority's evident indifference to state legal standards, however, that evaluation will never come.

Rather than correct the district court's undeniable errors, the panel majority washes its hands of Moore's case under the guise of respecting the clearly erroneous standard of review. That standard, however, cannot possibly justify the majority's limpness in the face of those mistakes. The effect, which must be attributed entirely to the majority itself, is to abandon any attempt to get the right result in a complex case, to leave a difficult (and still embryonic) patch of constitutional law unimproved, and to mock, on the flimsiest of foundations, the honest efforts of Texas state courts to apply *Atkins*.

The only redeeming feature of the majority's misguided opinion is that, as I noted at the outset, it is unpublished and therefore binding as precedent on no one except the parties to this case as it affects only this case. The correct resolution of these important questions, as they relate to the implementation of *Atkins* in Texas and in this circuit, must await another day and another panel. Moreover, because, under *Atkins*, the states are left to fashion their own response to that decision, the

majority's mangling of Texas legal standards is subject to ready correction by the TCCA or the legislature.

I respectfully dissent.

APPENDIX II

FILED JUNE 26, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-70038

ERIC LYNN MOORE
Petitioner-Appellee

v.

NATHANIEL QUARTERMAN, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

Before JONES, Chief Judge, KING, JOLLY, DAVIS, SMITH, WIENER, BARKSDALE, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, AND HAYNES, Circuit Judges.

PER CURIAM:

The issue before this en banc court is whether capital habeas petitioner, Eric Moore, was entitled to a *de novo* federal court decision whether his alleged mental retardation constitutionally exempts him from execution. We conclude, on the particular facts here presented, that

he was so entitled, and we return this case to the panel for review of the district court's finding.

Petitioner Moore was convicted and sentenced to death in Texas in 1991 and exhausted his direct and collateral remedies. He promptly sought further relief after the Supreme Court declared in *Atkins v. Virginia* that mentally retarded defendants are constitutionally immune from the death penalty. 536 U.S. 304, 122 S. Ct. 2242 (2002). The Texas Court of Criminal Appeals("TCCA"), from which he sought this relief, just as promptly denied his successive state habeas petition as an abuse of the writ under article 11.071,section 5(a) of the Texas Code of Criminal Procedure. *Ex Parte Moore*, No.38,670-02 (Tex. Crim. App. Feb. 5, 2003) (unpublished).[1] Moore proceeded to federal court, where this court authorized him to pursue a successive § 2254 petition. *In re Moore*, No. 03-40207, 67 F. App'x 252 (5th Cir. May 12, 2003) (unpublished) (citing 28 U.S.C. § 2244(b)(3)© ("The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.")). After considerable procedural activity in the federal district and appellate courts, Moore obtained an adversary *de novo* hearing. The district court found him mentally retarded and granted the writ.

A divided panel of this court reversed, finding Moore's state court claim unexhausted, that is, not fairly presented to the state courts for decision. *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007). Because Moore was thereby barred from seeking federal habeas

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[1] The TCCA stated: "We have reviewed the application and find it fails to contain sufficient specific facts which would satisfy the requirements of [article 11.071, § 5(a)]."

relief, the panel majority did not evaluate the district court's merits determination. Judge Dennis asserted in dissent either that Moore's claim was exhausted in state court or, if unexhausted, that recognized exceptions to the exhaustion doctrine applied. *Id.* at 224–32 (Dennis, J., dissenting). The court voted to rehear the case en banc. *Moore v. Quarterman*, No. 05-70038, 2008 WL 660420, at *1 (5th Cir. Mar. 12, 2008).

Federal cognizance of second or successive § 2254 petitions is governed by strict standards under the Antiterrorism and Effective Death Penalty Act("AEDPA"). Any such petition must be filed timely, 28 U.S.C. § 2244(d)(1)(C), and approved by the appellate court before it may be heard by a district court, 28 U.S.C. § 2244(b)(3). *See generally* 28 U.S.C. § 2244(a)-(d). Moore cleared those hurdles. Still, his petition was subject to different standards of review by the federal court depending on whether he exhausted or did not exhaust his mental retardation claim in the state courts.[2]

Determining whether a petitioner exhausted his claim in state court is a case- and fact-specific inquiry.[3] See *Morris v. Dretke*, 413 F.3d 484, 491, 495 (5th Cir.

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[2] If a petitioner exhausted his Atkins claim in state court, and the TCCA rejected the claim on the merits," AEDPA ordinarily requires deference to the state court's judgment on legal and factual grounds. 28 U.S.C. § 2254(d). See *Rivera v. Quarterman*, 505 F.3d 349, 355-56 (5th Cir. 2007); *Moreno v. Dretke*, 450 F.3d 158 (5th Cir. 2006). If a petitioner did not exhaust the Atkins claim by presenting it fairly to the state courts, the federal court ordinarily must, absent cause and prejudice or a "fundamental miscarriage of justice," dismiss or deny the petition. *Martinez*, 255 F.3d at 238-39, 239 n.12.

[3] For this reason, the issue of exhaustion in Moore's case is not controlled by this court's decisions in Morris or Rivera.

2005). The panel opinions demonstrate that reasonable arguments can be made for and against Moore's satisfaction of the exhaustion requirement in this case. Nevertheless, we conclude that this debate need not be pursued, because even if Moore failed to exhaust, the unique circumstances here establish cause for his default and prejudice in the absence of federal court review. *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991); *Martinez v. Johnson*, 255 F.3d. 229, 238–39 (5th Cir. 2001). The existence of "cause" for a procedural default "must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488,106 S. Ct. 2639, 2645 (1986). Further, to show "prejudice" a defendant must demonstrate that errors "worked to his *actual* and substantial disadvantage," amounting to errors of constitutional dimensions. *See United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982) (emphasis in original).[4]

Moore had cause for misunderstanding the state's successive writ procedures because, when he filed his *Atkins* petition on December 26, 2002, the TCCA had published no opinion explaining the factual criteria that must be pled in an *Atkins* petition, nor had such criteria become evident in practice, arising from the unpublished disposition of similar petitions. The earliest explanation occurred in *Ex parte Williams*, No. 43907-02, 2003 WL 1787634, at *1–2 (Tex. Crim. App. Feb. 26, 2003)

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[4] Because the cause and prejudice standard is met, we need not discuss the "fundamental miscarriage of justice" exception to exhaustion. See *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514 (1992).

(Cochran, J., concurring) (unpublished).[5] Moreover, *Atkins* specifically reserved to the states the adoption of procedures to implement its new constitutional rule, yet only a few months had passed before Moore filed his petition, and the State had not taken any definitive action. Moore could not exhaust a remedy that the TCCA had not yet articulated; this "cause" was external to Moore and beyond his control. Further, Moore would plainly suffer prejudice from being unable to establish the facts involved in his mental retardation claim. Moore's mass of evidence, taken at face value, presented a substantial *Atkins* claim.

Because Moore had cause for and suffered prejudice from the then uncertain state of Texas law on how to present *Atkins* evidence in state court, the federal district court had the authority to review his claim, even if it was unexhausted, and was under no obligation to defer to the state court's decision. We RETURN this case to the panel for review of the ultimate *Atkins* determination of mental retardation under the clear error standard.

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[5] Later the TCCA codified what had by then become its practice in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)

APPENDIX III

Filed July 1, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERIC LYNN MOORE,	§	
Petitioner,	§	
	§	CIVIL ACTION
v.	§	NO. 6:03-CV-224
DOUG DRETKE, Director,	§	
Texas Department of Criminal	§	
Justice Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER[1]

Eric Lynn Moore ("Moore") brings this application for a writ of *habeas corpus* seeking to avoid execution on the grounds that he is mentally retarded (Docket No. 2). Having considered the record and conducted an evidentiary hearing, the Court GRANTS Moore's application. The Court will issue a writ of *habeas corpus* to respondent Doug Dretke ("the Director"), enjoining him from executing Moore.

BACKGROUND

On December 10, 1990, Moore and three accomplices gained entrance to Richard and Elizabeth Ayers' home. The men brutally robbed and shot the elderly couple. Mrs. Ayers died from her wounds; Mr. Ayers, though paralyzed from the waist down, survived.

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[1] This opinion constitutes the Court's findings of fact and conclusions of law. Any finding found to a conclusion is adopted as such and any conclusion found to be a finding is adopted as such.

On June 19, 1991, Moore was convicted of capital murder and on June 27, 1991 was sentenced to death.

On June 29, 1994, the Texas Court of Criminal Appeals affirmed Moore's conviction and sentence. Moore then filed an application for state post-conviction relief, which did not include a claim that he was mentally retarded ("non-mental-retardation application"). The Texas Court of Criminal Appeals denied Moore's initial non-mental-retardation state application on November 25, 1998. Moore then filed a federal non-mental-retardation application for writ of *habeas corpus* in this Court, which the Court denied on November 26, 2001, and the United States Court of Appeals for the Fifth Circuit affirmed on April 7, 2003.

On June 20, 2002, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304, in which it held for the first time that it was unconstitutional to execute the mentally retarded. In *Atkins*, the Court reasoned that a national consensus had been reached against executing mentally retarded offenders and thus doing so is unconstitutional under the Eighth Amendment as an excessive punishment. *Id.* at 317, 321. According to the Court, this consensus reflects the widespread belief that the mentally retarded are less culpable for their crimes. *Id.* The Court also stated that the same cognitive and behavioral characteristics that make the mentally retarded less culpable also make them less likely to be deterred from crime by the death penalty. *Id.* at 320. Furthermore, the Court found that some characteristics of the mentally retarded undermine the procedural protections in capital cases, such as aiding in their own defense. *Id.* at 318, 320. The Court also observed that the mentally retarded typically make poor witnesses and their demeanor may create an undeserved perception that they lack remorse. *Id.* at 321. The Court reasoned that these considerations increase the risk that

the death penalty may be imposed despite factors that call for a less severe sentence. *Id.* at 320. Thus, the Court concluded that the mentally retarded face a special risk of wrongful execution. *Id.* at 321. The Court, however, left the task of appropriately enforcing the constitutional restriction against executing the mentally retarded to the States, which brings us here. *Id.*

Shortly after *Atkins* was decided, Moore filed a second state application for post-conviction relief, claiming for the first time that he was mentally retarded and executing him would violate the Eighth Amendment("mental-retardation application"). On February 5,2003, the Texas Court of Criminal Appeals dismissed Moore's mental-retardation state application as an abuse of the writ because "it fail[ed] to contain sufficient specific facts which would satisfy the requirements of [Texas Code of Criminal Procedure] Art. 11.071, Sec. 5 (a)."

With the Fifth Circuit's permission, Moore filed a second federal application for a writ of *habeas corpus,* which included a mental-retardation claim. In *Atkins,* the Supreme Court specifically charged the states with defining mental retardation in the capital punishment context, and the Fifth Circuit has held that federal district courts should have no role in the resolution of *Atkins* claims until after the appropriate state court shave had the opportunity to apply *Atkins. Atkins,* 536 U.S. at 317; *Bell v. Cockrell,* 310 F.3d 330, 332-33 (5th Cir. 2002). Accordingly, on July 28, 2003, this Court granted Moore's application in part, finding the State had failed to provide the mental retardation determination hearing to which Moore was entitled under *Atkins* and directed the State to provide Moore such a hearing. However, on May 7, 2004, the Fifth Circuit vacated the writ and remanded the case back to this Court, directing this Court to determine whether Moore's claim is

procedurally defaulted and, if not defaulted, for this Court to determine whether Moore is entitled to *Atkins* relief on his mental-retardation claim. *Moore v. Dretke,* 369 F.3d 844, 846 (5th Cir. 2002) (per curiam). On June 8, 2004, this Court restated its earlier finding that Moore's claim had not been procedurally defaulted and found that Moore was entitled to an evidentiary hearing. The Court conducted such an evidentiary hearing on the issue of Moore's mental retardation on December 28-30, 2004. Because this case involves a conviction and sentence imposed under state law, the Court applies state law in deciding Moore's application.

STANDARD OF REVIEW

Relief in *habeas corpus* may not be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication resulted in a decision that involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254 (d)(1). But if the state court did not adjudicate the claim on its merits, a federal court must determine the claim *de novo. Miller v. Johnson,* 200 F.3d 274,281 n.4 (5th Cir. 2000), *cert. denied,* 531 U.S. 849 (2000).

The Director contends the Texas Court of Criminal Appeals' decision that Moore failed to allege specific facts that would satisfy the elements of the state's subsequent post-conviction application rule actually meant that "his application was dismissed as abusive because it failed to contain sufficient, specific evidence of mental retardation." *See* Respondent's [sic] Dretke's Pre-Hearing Brief at 2 (Docket No. 63). The Director contends that a determination that an applicant's evidence was insufficient to establish his claim is an adjudication on the merits; therefore, this Court should apply the deferential standard of review of 28 U.S.C. § 2254 (d)(I),

rather than the *de novo* standard. The Court disagrees for two reasons.

First, the Court of Criminal Appeals did not state that it dismissed Moore's application because it did not contain specific evidence of mental retardation. Rather, the court stated it dismissed his application because Moore failed to allege specific facts that would satisfy the elements of the state's subsequent application rule.

Second, the rule's plain language provides:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

TEX. CODE CRIM. PROC. art. 11.071 §5(a)(1). Even assuming *arguendo* that Article 11.071 section 5(a) requires an applicant to allege specific facts that would entitle him to relief on his mental retardation claim, the rule unambiguously states that if sufficient facts are not alleged, a court may not consider the merits of the claim. Therefore, the court's dismissal of Moore's subsequent application could not have been an adjudication on the merits of Moore's mental retardation claim. Because Moore's claim is not procedurally defaulted and the

deferential standard of review set forth in 28 U.S.C. § 2254 (d)(1) does not apply, this Court determines the issue of Moore's mental retardation *de novo*.

DEFINING MENTAL RETARDATION

Since the Texas legislature had not enacted any guidelines for determining mental retardation in the capital-punishment context,[2] the Texas Court of Criminal Appeals reluctantly took on the task of setting forth interim guidelines in *Ex parte Briseno,* 135 S.W.3d 1 (Tex. Ct. Crim. App. 2004). The *Briseno* court adopted mental-retardation definitions used by the American Association of Mental Retardation("AAMR") and by the Texas Health and Safety Code. *Id.* at 8. Both are similar. Under the AAMR definition, mental retardation is characterized by three elements:

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[2] Since *Atkins*, the biennial Texas Legislature has convened twice in regular session. In both the seventy eighth and seventy-ninth legislative sessions, the Texas Legislature failed to enact legislation carrying out the *Atkins* mandate. After the seventy-eighth session convened without setting forth the legal structure to analyze *Atkins* claims, the Texas Court of Criminal Appeals was forced by the Legislature's inaction to provide the bench and bar with temporary judicial guidelines to address the swell of *Atkins* claims before the courts. *See Ex parte Briseno, 135* S.W.3d I (Tex. Ct. Crim. App. 2004). At the end of the seventy-ninth legislative session, the Texas Legislature still had not enacted legislation setting forth standards for determining mental retardation in the capital-punishment context in Texas. House Bill 419, which addressed the issue, did not move out of the Criminal Jurisprudence Committee. Accordingly, *Briseno* still governs this analysis. The Legislature did pass Senate Bill 60, which modifies the alternative punishment in capital cases to life without parole from life with the possibility of parole.

> (1) "significantly sub-average' general intellectual functioning" defined as "an IQ of about 70 or below (approximately two standard deviations below the mean)";
>
> (2) "accompanied by 'related' limitations in adaptive functioning" defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales";
>
> (3) "the onset of which occurs prior to the age of 18."*Id.* at 7 & n.24 & 25 (citing AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (9th ed. 1992) [hereinafter AAMR 9th ed.]. Under the Texas Health and Safety Code definition 'mental retardation' means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period "where" [a]daptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group. TEX. HEALTH & SAFETY CODE ANN. §591.003(13), (1).

Both definitions require significant sub average intellectual functioning with limited adaptive functioning and on set prior to adulthood. However, the AAMR definition is more specific, defining each of the elements

more narrowly than the Texas Health and Safety Code definition, and is thus more useful in application. Both parties used the AAMR definition during the evidentiary hearing. Consequently, the Court will analyze Moore's claim using the AAMR definition.[3]

APPLICATION OF THE AAMR DEFINITION TO MOORE

According to *Briseno,* for a defendant to avoid the death penalty he must prove by a preponderance of the evidence that he is mentally retarded. *See Briseno,* 135 S.W.3d at 12. Thus, the burden of proof is on Moore to show by a preponderance of the evidence that he had (1) significant subaverage intellectual functioning, (2) with related limits in adaptive functioning, and (3) the onset of which occurred prior to age eighteen.

1. Significantly subaverage general intellectual functioning

A. Standard

"'Significantly subaverage' general intellectual functioning" is defined "as an IQ of about 70 or below." *Id.* at 7 & n.24 (citing AAMR 9th ed. at 5). The American Psychiatric Association ("APA") recognizes four categories of mental retardation: mild, moderate, severe, and profound. *Id.* at 5 (citing APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41-

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[3] Moore relies on the AAMR definition in his trial brief, and does not mention the Texas Health and Safety Code. The Director in his trial brief did not specifically mention either definition, although in discussing adaptive functioning, he used the term "deficit," which comes from the Texas Health and Safety Code, rather than "limitation," which comes from the AAMR.

42 (4th ed. 2000) [hereinafter DSM-IV]). Eighty-five percent of the mentally-retarded population are mildly retarded. DSM-N at 41. Individuals with IQ scores between about 55 to 70 are classified as mildly mentally retarded if they satisfy the adaptive-functioning and age-at-onset criteria. DSM-IV at 40.

A standardized IQ test's mean score is typically 100, with a standard deviation of 15; thus, a score of about 70 is approximately two standard deviations from the mean. *Id.* IQ tests typically have a five point standard error of measurement, which means that any score actually represents a score that could be five points higher or lower. *See Briseno,* 135 S.W.3d at 14 n.53; DSM-IV at 39. Accordingly, a test score as high as 75 may represent an IQ as low as 70.

B. Documentary evidence and lay testimony

Moore has taken three IQ tests over the course of his lifetime: when he was in first grade, when he was twenty-four years old, and when he was thirty-eight year old.[4] The second and third tests were taken during Moore's incarceration. His scores on these tests were 74, 76, and 66, respectively. The average of these three scores is 72.

C. Experts' opinions

Moore's expert, Dr. Llorente, administered Moore's third IQ test (WAIS-III), as well as a test of non-verbal

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[4] The first test was the SRA Primary Mental Abilities Test (PMA), apparently given to him by his school. The second test, the Wechsler Adult Intelligence Scale-Revised (WAIS-R), was given to him by Dr. Richard Fulbright prior to his trial in 1991 . Dr. Llorente, Moore's expert, administered the third test, the Wechsler Adult Intelligence Scale-III (WAIS-III).

abilities (TONI-2), which reduces the impact of the test taker's educational background on his score. Moore's score on the WAIS-III places him in the lowest one percentile of the entire population, and his score on the TONI-2 places him in the lowest eight-tenths percentile of the entire population. Dr. Llorente found Moore's third IQ test score to be consistent with his earlier scores. Although Dr. Llorente could not testify with certainty to the margin of error in Moore's first test, Dr. Llorente did testify that these scores probably overlap when their margins of error are considered, which demonstrates consistency in their findings. Moore's scores on other tests showed no response bias, which is an attempt by Moore to perform poorly.

Although Dr. Mears and the Director questioned the validity and accuracy of Moore's IQ tests, on cross-examination Dr. Mears adopted all three tests,[5] results and agreed that Moore satisfies this prong of the AAMR mental-retardation definition.

D. Court's findings

The average of Moore's three IQ test scores is 72. With a five-point standard error of measurement and both experts agreeing that Moore satisfies this criterion for mental retardation, the Court concludes that Moore has proven by a preponderance of the evidence that he

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[5] The Director questioned Dr. Llorente's reliance on Moore's first IQ test, the PMA, because it is designed to be administered individually and there are no records to confirm this was done. Dr. Mears testified that he believed Moore's second IQ test resulted in an artificially low score because it did not account for Moore's age and educational level. On the third test, Moore missed questions that he answered correctly on the second test, and the Director implied that Moore intentionally missed these questions to achieve a lower score.

satisfies the AAMR criterion of subaverage intellectual functioning defined as an IQ of "about 70 or below."

2. Related limitations in adaptive functioning

A. Standard

Related limitations in adaptive functioning are "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales" that are related to the individual's cognitive deficiencies. *Briseno,* 135 S.W.3d at 7 & n.25 (citing AAMR 9th ed. at 5).[6] The AAMR sets forth three

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[6] In discussing adaptive functioning, the *Briseno* court also suggested an additional seven evidentiary factors "which fact finders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder." *Briseno,* 135 S.W.3d at 8. Analysis of these additional factors is not required but is discretionary. These factors are: (1) whether those who knew the person best during the developmental stage thought he was mentally retarded at that time, and if so, acted in accordance with that determination; (2) whether the person formulates plans and carries them through or whether his conduct is impulsive; (3) whether his conduct shows leadership or shows that he is led around by others; (4) whether his conduct in response to external stimuli is rational and appropriate, regardless of whether it is socially acceptable; (5) whether he responds coherently, rationally, and on point to oral or written questions or whether his responses wander from subject to subject; (6) whether he can hide facts or lie effectively in his own or others' interests; and (7) whether, putting aside the crime's heinousness or gruesomeness, committing the crime required forethought, planning, and complex execution of purpose. *Id.* The *Briseno* court suggested these factors to aid in differentiating between limitations in adaptive functioning caused by a personality disorder and those caused by mental retardation. In *Briseno,* the defense expert concluded that Briseno was mentally retarded, but, using the same evidence, the state's

adaptive-behavior areas applicable to determining mental retardation: conceptual skills, social skills, and practical skills. AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 73 (10th ed. 2002) [hereinafter AAMR 10th ed.]. Conceptual skills include skills related to language, reading and writing, money concepts, and self-direction. *Id.* at 82. Social skills include skills related to interpersonal relationships, responsibility, self-esteem, gullibility, naivete, following rules, obeying laws, and avoiding victimization. *Id.* Practical skills include skills related to personal daily living activities such as eating, dressing, mobility, and toileting; instrumental daily living activities such as preparing meals, taking medications, using the telephone, managing money, using transportation, and housekeeping activities; occupational skills; and maintaining a safe environment. *Id.*

According to the AAMR, limitations in adaptive behavior can and should be determined by using standardized tests that are nonned on the general population, which includes people with and without mental retardation. *Id.* at 83. A "significant" limitation is established by a score of two standard deviations below

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expert found no mental retardation, instead finding evidence consistent with antisocial personality disorder. *Id.* at 13.

This Court will not analyze these factors for four reasons: First, the Director did not even argue or present evidence that Moore has a personality disorder that accounts for his deficiencies in adaptive functioning, which was the basis these factors were even mentioned in *Briseno*. Second, even if such an issue had been raised, there is no evidence to support a finding that a personality disorder is responsible for Moore's cognitive and adaptive deficits. Third, the Court notes that these factors are not part of the AAMR's definition of mental retardation, which the *Briseno* court substantively adopted as the test under *Atkins*. Finally, according to *Briseno*, analysis of these additional factors is not required but is discretionary.

the mean in one of the three adaptive-behavior skill areas. *Id.* at 78.

There are many respected standardized measures that are commonly used, including the Vineland Adaptive Behavior Scales, the AAMR Adaptive Behavior Scales (ABS), the Scales of Independent Behavior, the Comprehensive Test of Adaptive Behavior-Revised, and the Adaptive Behavior Assessment System. *Id.* at 88-90. Typically, these measures require the clinician to interview a parent, teacher, or direct-service provider of the individual being assessed. *Id.* at 85. The interviewees should be well-acquainted with the individual's behavior over an extended period of time and in multiple settings. *Id.* Observations, interviews, and other assessment methods that gather information about adaptive behavior may complement standardized measures but ordinarily should not replace them. *Id.* at 84.

However, diagnosing mental retardation will often require applying clinical judgment if earlier information is lacking or incomplete, if the individual's adaptive behavior cannot be assessed using standardized scales in his current environment, or if determining whether the onset was prior to age eighteen in an adult. *Id.* at 94. Such is the situation here. Clinical judgment is based on training, experience with others who are mentally retarded, and familiarity with the individual and his environment. *Id.* at 95. Therefore, the Court will consider the experts' clinical judgments and other evidence to determine whether Moore has significant deficits that place him approximately two standard deviations below the mean in adaptive functioning.

Individuals with mild mental retardation can develop social and communication skills in the first five years of life and have minimal sensorimotor impairments. *Id.* They are indistinguishable from non-

mentally retarded children until a later age. *Id.* By the late teens, a mildly mentally retarded individual can acquire academic skills up to about a sixth-grade level. *Id.* As an adult, he is usually able to achieve social and vocation skills that allow for minimum self-support, but he may need supervision, guidance, and assistance, especially during times of unusual social or economic stress. *Id.* A mildly mentally-retarded adult can usually successfully live in the community, either independently or in supervised settings if given an appropriate support system. *Id.*

B. Documentary evidence and lay testimony

Moore's educational records are incomplete, which is not surprising given that they are twenty to thirty years old. However, the parties were able to provide the Court with Moore's school records from the first, fourth, fifth, last part of the sixth, and seventh grades from the Celina School District. The parties also provided the Court with Moore's third-grade records from the Plano School District. The Court considers these records to be some of the most objective and enlightening evidence presented.

Additionally, the Court received testimony from numerous lay witnesses including Kelly Moore, Moore's younger sister; Carl Jackson, Moore's maternal uncle by marriage, who has known Moore since Moore was five or six; Betty Jackson, Moore's maternal aunt; Jean Lynn, Moore's maternal grandmother; Cynthia Easley, a junior-high-school classmate; Jackie Tyrone Brown, Moore's younger brother's childhood friend; Mary Bradshaw, Moore's first-grade teacher; Elizabeth Joan McKnight, Moore's fifth-grade teacher; Mary Hughes, a junior-high-school teacher; Larry Lambert, Moore's seventh-grade teacher; Jerry Moore (no relation), Moore's junior-high-school principal; and several correctional officers that

work in Moore's death-row unit.

The Court will first consider the documentary evidence and lay testimony from Moore's early childhood to adulthood, and then consider the expert opinions in its analysis.

I. Early childhood

Mrs. Jackson, Moore's maternal aunt, thought Moore was withdrawn from other children and cognitively slow. She testified that, on Moore's side of the family, she has an aunt and a cousin that are considered slow and a niece that has been diagnosed as mentally retarded.

Mr. and Mrs. Jackson both testified that Moore's father physically abused Moore and his siblings. Moore' sister Kelly corroborated this. Moore's father became abusive and violent towards Moore's mother when he drank. Although the other children recognized the danger and tried to hide, Moore lacked this instinct and often tried to protect his mother. Mr. Jackson testified that during one incident Moore's father had thrown Moore against a wall.

ii. School-age

Kelly Moore, Moore's younger sister by a year, testified that at age six and seven Moore still had trouble putting the right shoe on the right foot. Mr. Jackson testified that Moore was slower to learn life skills like dressing himself and tying his shoes than Jackson's own children, who were younger than Moore. Moore also had difficulty learning to speak in sentences and paragraphs. When Mr. Jackson coached Moore's little league baseball team, he saw that Moore had a much more difficult time learning to play baseball than the other children his age.

Moore's grandmother, Jean Lynn, testified that she too thought Moore was slow and had trouble forming sentences. According to her, Moore was finally able to dress himself around age six or seven but was never able to ride a bike. While Mrs. Lynn testified that Moore could read as a young boy and particularly liked Jet Magazine, his sister testified that Moore was not really reading the magazine but rather looking at the pictures.

Moore started the first grade during the 1973-74 school year, but ended up having to repeat it. According to his school records, Moore achieved the grade "Unsatisfactory" in Arithmetic, Reading, Language and Grammar, and Handwriting. His records indicate he was retained and referred to special education.[7] In the spring of 1974, Moore took an achievement test, the SRA form E." The normal achievement level would have been that of a first grader in his seventh month of school. However, Moore scored at the achievement level of a first grader with no additional months of school, at least seven months behind normal. One of the educators testified that the test did not recognize a score below the first-grade level. By the end of the first grade, Moore was already performing at least seven months below grade level, and perhaps more.

Moore's first-grade teacher, Ms. Bradshaw testified that Moore was a slow student that needed help. Ms.

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[7] There seemed to be disagreement between Moore and the Director as to whether Moore attended special education classes. Moore did not present school records indicating that he was placed in a separate special education class, but argued that those records were destroyed. Moore has told others that he was in special education classes, and his family also confirms this. The Director tried to characterize the special education classes as the "corrective" classes that Moore was placed in for certain subjects within his mainstream classroom.

Bradshaw could not recall whether she taught Moore during his first year in first grade or his second year in first grade when he was held back. She testified that while she would not "consider" him to be mentally retarded, she did not know the legal definition of mental retardation under the AAMR. She did find Moore to be socially awkward and quiet and could not recall whether he could tie his shoes or not. Ms. Bradshaw admitted that her memory of Moore is "very sketchy" and that he did not stand out in her mind.

After Moore repeated the first grade, he and his sister Kelly Moore were in the same grade, even though she was a year younger. They attended special education classes together. Kelly testified that her brother did not do well in school. "He couldn't stand to read or math; and I used to try and help him all the time, because we was basically in the same classes.... Basically I did most of his work because he just-he didn't do it. ... He wanted to do it, but he just got frustrated trying to do it." Kelly testified that Moore was unable to do much math, but progressed somewhat in his ability to read.

Mrs. Jackson, Moore's aunt, testified that when Moore's older brother was on his deathbed, he confessed to her that his stepmother, Kathryn Goodman, had molested the Moore children. Kelly Moore corroborated this, testifying that Goodman physically and sexually abused all the Moore children. According to Kelly, Goodman's sexual abuse of Moore began when he was about nine years old. Kelly had seen Goodman inappropriately kissing Moore, giving him alcohol, and having intercourse with him when he was nine or ten years old. Kelly testified Goodman abused Moore nearly every night taking advantage of him because he was slow. The Moore family believes that Moore fathered Goodman's child when he was about ten years old.

Moore attended the third grade in Plano. On his report card, his teacher indicated he was functioning at a second-grade level in Reading and Language and at third-grade level in Math. Moore's Reading and Language grades were C's, his Spelling grade was a C-, his Math grade was a B-, and his Social Studies and Science-Health grades were B+'s. However, his apparent average grades are belied by his documented scores on the Comprehensive Test of Basic Skills I, a nationwide standardized test. When Moore took the test, his actual grade level was 3.6.[8] On the test, Moore tested at the 2.1 reading level, the 1.9 language level, and the 2.1 arithmetic/mathematics level. These scores place Moore in the twelfth percentile in reading, the seventh percentile in language and math, and the sixth percentile overall. Importantly, however, these percentiles are based on other third graders, most of whom would have been a year younger than Moore because he repeated the first grade. Overall, he tested at the 1.9 grade level, roughly a year and a half behind his actual grade level and two and a half years behind other children his age.

Mr. Brown, a childhood friend of Moore's younger brother, also testified that Moore was "real slow" and that "[h]e would kind of make you think that he was kind of halfway on the retarded side." According to Mr. Brown, Moore did not learn things as easily as other children. Mr. Brown testified that, despite being in "resource classes," when Moore was in the third or fourth grade he was still struggling with beginner reading books. Although Mr. Brown is a few years younger than Moore, he would sometimes try to help Moore read these books.

In the fourth grade, Moore's grades ranged from

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[8] Moore was in the third grade and six-tenths through the school year.

the upper 60's in Arithmetic and Science, to the low 70's in Grammar, Reading, Geography, and Health, and to the mid to upper 70's in Spelling and Writing. Moore's highest grade, an 83, was in Citizenship. However, again, Moore's standardized test scores belie the grades he received. Moore scored at the level of a second grader in his ninth month of school when the normal score was that of a fourth grader in his seventh month. Moore was now performing nearly two years below his grade level, and three years behind other children his age.

iii. Early adolescence

During the fifth grade, Moore participated in a "corrective reading" class rather than the regular fifth grade reading class. In corrective reading, Moore's overall grades were in the low 80's.[9] Although Moore achieved low A's and high B's in Citizenship, his grades in Grammar, History, Arithmetic, and Science were in the upper 50's and low 60's. However, again, Moore took another standardized achievement test, which indicated that he was performing well below his grade level. Although Moore was now a twelve-year-old fifth grader, he was performing at the same level as a third grader in the fourth month of the school year, more than two years behind his grade level and three years behind his age level.

Moore's fifth-grade teacher, Ms. McKnight, testified that Moore performed "a little below average" and she believed his performance "could have improved with more effort." Ms. McKnight testified that it was readily apparent when children in her classroom were

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[9] Because this was a corrective class, this grade is likely much higher than what he would have received in a mainstream class.

mentally retarded, and she did not regard Moore as mentally retarded. However, on cross-examination she admitted that she did not know the legal or clinical definition of mental retardation. Ms. McKnight explained why she did not do more to help Moore academically: "Even though the flags [indicating cognitive difficulties] are there, your hands are virtually tied. There is not a lot to be done." Ms. McKnight did not consider Moore to be a leader, but thought he was more likely to join a group as a follower. Ms. McKnight testified she passed Moore on to the sixth grade because his already advanced age for a fifth grader made it preferable to pass him on rather than retain him in the fifth grade for another year.

With regard to Moore's sixth grade year in the Celina school district, the Court only has records from the last quarter, and no standardized achievement tests. His grades ranged from a 66 in Grammar, a 73 in Reading, a 70 in Spelling and History, to a 79 and 80 in Science and Arithmetic, respectively. Moore also earned a B+ in Citizenship.

In the seventh grade, Moore was again placed in a corrective Spelling class, in which he received a grade of 86. [10] His Grammar grade remained a 66 and his Reading grade remained in the low 70's, while his History grade dropped to a 33, his Arithmetic grade fell to a 42,and his Science grade fell to a 65. And, again, there were not standardized achievement test results for the seventh grade.

According to Ms. Hughes, a teacher at Moore's junior high school, Moore had some behavioral problems.

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[10] Again, because this was a corrective class, this grade cannot be compared to a grade in a mainstream class, in which Moore would have likely done very poorly.

He had trouble completing his work in her class and often appeared tired and sleepy. Ms. Hughes could not say whether Moore attempted to cover his inability to do the work by appearing tired and sleepy, a masking strategy she found common in children in remedial classes.

Mr. Lambert, a seventh-grade-science teacher at Moore's junior high school, testified that he could not recall whether or not he actually taught Moore, but if he had, it would have been in seventh grade science. He testified that Moore was just like all the other junior-high students, "mischievous and having a good time." He testified that Moore's grades were in the 60's and 70's and, like all other students, Moore would have performed better had he applied himself more. Mr. Lambert also testified that Moore did not appear to have any social or communication difficulties and that Moore was able to learn from his mistakes. Finally, Mr. Lambert testified that all the children in the Moore family were thought of as "slow."

Moore's junior-high-school principal, Mr. Jerry Moore (no relation) testified that he also never suspected Moore was mentally retarded. Mr. Jerry Moore also testified that he believed Moore negatively influenced other children. When pressed, he admitted that he did not recall a lot about Moore and his conclusion about Moore's possible mental retardation was based on school records, which in his opinion did not indicate mental retardation. He was unaware, and surprised to learn, that mentally-retarded individuals can achieve academic skills up to the sixth grade. He had no explanation for Moore's missing school records.

Cynthia Easley, one of Moore's junior-high classmates, testified that Moore still struggled with reading and grammar, which drew ridicule from the other children. She stated that Moore was sometimes unable to

follow instructions written on the chalkboard and recalled an occasion when Moore was unable to cut stars out of paper during a group project. Ms. Easley thought Moore could do addition and subtraction, but he had problems with division. She testified that although the teachers placed Moore in special classes, they passed him on.

Ms. Easley described Moore as distant, a loner, a little slow, and as a follower who was easily manipulated and tricked. She admitted tricking him to get his candy and remembered that he would try to "joke his way out of things to cover up [his cognitive shortcomings]." She was unable to hold a conversation with him and thought Moore was less mature than other children.

Moore's sister and aunt both testified that even at ages eleven and twelve Moore was unable to properly dress himself and would go outside in the winter underdressed for the cold, wearing only a t-shirt. According to Mr. Jackson, Moore had difficulty dressing himself until junior high. Ms. Easley agreed that this problem persisted into Moore's junior-high-school years. Mr. Brown testified that Moore did not learn to tie his shoes until about the eighth grade. Neither Mrs. Jackson nor Ms. Easley had ever seen Moore tell time.

iv. Late adolescence

Mr. Jackson had tried to teach Moore to drive, but was unable to. Mr. Jackson was unaware and surprised that Moore had gotten his driver's licence because Mr. Jackson did not think Moore could pass the test. Mr. Jackson testified that he would not get into a car if Moore was driving. Similarly, although Moore's grandfather tried to teach him to drive a tractor, he was unable to grasp how the gears functioned.

Mr. Jackson had a business transporting railroad

ties and let Moore work for him lifting heavy railroad ties. The standard procedure required one person lifting at each end of the tie at the same time. However, Moore did not understand that he had to coordinate his movements with the movements of the other person holding the other end of the railroad tie. Moore often threw his end down, leaving the other man with the entire weight of the tie. This endangered the men Moore worked with, and Mr. Jackson eventually had to stop allowing Moore to work for him.

Mr. Brown testified that he and Moore sometimes baled hay on Moore's grandfather's farm for extra money. They were paid by the bale, but Moore could not count money and could not tell if he was given proper wage; nor could he tell if he was given the correct change at a store. Mr. Jackson recounted a time when Moore was a teenager applying for a job at a local business. Moore was unable to fill out the application, and a friend had to do it for him. Similarly, Mrs. Jackson testified that when Moore applied for a job at Mervyn's, he had to bring the job application home to fill out because he needed help with it. Mrs. Jackson did not believe Moore was sufficiently skilled in reading and writing to understand a job application by himself.

Moore was expelled from school in the eleventh grade because he punched the principal in the face. There was some evidence that Moore began a GED program and a job corps training program, but he apparently completed neither.

v. *Adulthood*

As an adult, Moore was employed in several jobs that required little skill. Moore listed four previous

employments on his Mervyn's employment application.[11] Moore had flipped burgers at a fast food restaurant and worked at a moving company. Whether he actually worked at the two other jobs was contested. One job Moore listed appeared to be his father's place of employment. The evidence was contradictory as to whether he merely went with his father to his father's job or whether Moore worked there himself. The other job Moore appeared to work at for only a few days. Moore had attendance and tardiness problems at his past employments, and Moore was fired from Mervyn's for similar reasons. At some point during his adulthood, and apparently before he committed the criminal offense that brought him here, Moore fathered a child who died as an infant.

Several officers from Moore's prison unit testified that Moore is able to communicate with them and follow the rules. While in prison, Moore married and divorced a girlfriend he had in the civilian world. They testified that Moore's personal hygiene is acceptable and he keeps his cell in average neatness. He appears to get along with both guards and inmates, and several guards testified he keeps books, magazines, and newspapers in his cell. Guards also testified that they have observed him reading in his cell. Finally, the guards admitted that prisoners help each other, including helping one another fill out necessary forms.

C. Experts' opinions

Dr. Llorente assessed Moore by interviewing him for seven to eight hours, interviewing his family members, and administering a battery of tests. Dr.

---

[11] Whether Moore filled out the Mervyn's application by himself was also contested.

Llorente testified that there are several scales that can be used to measure a person's adaptive functioning, including the Vineland Adaptive Behavior Scales, but these scales were designed to assess adaptive behavior at the time they are administered, not retrospectively. Accordingly, as the AAMR recognizes may be necessary, Dr. Llorente applied his clinical judgment rather than adaptive scales to assess Moore's adaptive behavior prior to age eighteen.

Dr. Llorente testified that Moore meets the adaptive functioning criterion for mental retardation. Dr. Llorente found that Moore has significant deficits in adaptive behavior. Moore's academic performance evidences a deficiency in conceptual skills. Moore's social deficiencies are demonstrated in his being manipulated and taken advantage of by other children, his difficulty being part of a group and communicating as reported by his family, and his inability to avoid sexual abuse. Moore's home life and work history evidence a deficiency in practical skills. As a child Moore reportedly had problems dressing himself, and as an adult Moore had problems keeping a job and performing adequately, despite the fact that his jobs were unskilled and menial in nature. Dr. Llorente noted that there was no evidence Moore ever paid rent or managed money. Moore did not seek help from others for either his stepmother's abuse or his problems with drugs, and Moore's self report that he had tried to either take his life or mutilate himself also evidence deficiencies in the practical skill domain.

In order to assess Moore's adaptive abilities, Dr. Mears interviewed Moore for two to two and a half hours. Dr. Mears did not independently interview others who knew Moore as a child or adolescent. Although he listened to Moore's family members and acquaintances' testimony during the evidentiary hearing, he did not consider it because, according to him, they did not testify

to anything significant enough to change his opinion. Dr. Mears based his opinion primarily upon his interview with Moore and Moore's responses to the Vineland scales. Dr. Llorente criticizes this methodology because Dr. Mears was only able to use some of the Vineland scales due to Moore's confinement. Furthermore, Dr. Llorente believed that Dr. Mears inappropriately utilized the scales by interviewing Moore rather than others who knew him because mentally retarded individuals often give inaccurate or unreliable historical information.

Dr. Mears was of the opinion that Moore did not have significant deficiencies in his adaptive functioning, but believed Moore has "very high adaptive functioning in terms of his work history," testifying that he "was kind of impressed that despite all his horrible childhood experiences, [Moore] had tried to get out there and learn a job." Based on Moore's transcripts and GPA, Dr. Mears found "[Moore's] academic functioning is really not bad at all. He got to the eleventh grade." Dr. Mears admitted he did not have enough information to have an opinion on Moore's social skills during junior or senior high school, but he believed Moore has "excellent social and interpersonal skills" based on Moore having had a girlfriend, the grief Moore experienced over the death of his infant daughter, and Moore's interview statement that he "preaches to the other prisoners." Again, while Dr. Mears admitted he did not know the extent of Moore's self direction before age eighteen, he believes Moore now has self direction.

Dr. Mears concluded that Moore's adaptive functioning exceeds that of all the defendants Dr. Mears has seen in the last five years, and thus Dr. Mears could not find Moore mentally retarded regardless of Moore's IQ score. Dr. Mears conceded that Moore may be a slow learner and may have learning disabilities, but contended Moore was not mentally retarded because Moore made it

to the eleventh grade.

D. Court's findings

On all three criteria, but especially Moore's adaptive functioning, the Court finds Dr. Llorente's testimony and assessment more credible than Dr. Mears's. Dr. Llorente spent seven to eight hours interviewing and evaluating Moore, while Dr. Mears spent only two to two and half hours. Dr. Llorente contacted and interviewed Moore's family members to learn about Moore's childhood, while Dr. Mears did not contact or interview anyone[12] because he thought their opinions were not useful. Instead, Dr. Mears relied exclusively on his comparatively brief interview with Moore and his review of Moore's records. Dr. Llorente administered a large battery of tests to Moore. Dr. Mears also performed some tests on Moore, but not nearly as many.

Additionally, Dr. Mears's assessment of Moore's academic record appears less than comprehensive. While Dr. Mears placed a great deal of weight on Moore's advancement to the eleventh grade, there was no evidence that Moore was ever able to perform at the eleventh-grade level. In fact, there was strong evidence to the contrary, with most tests showing he was falling further behind his actual grade level each year. On Moore's Mervyn's medical history form, he stated, "Some Time I have Those dizziness spell when over Heated." On his Mervyn's statement of injury form, he described how he injured his back, rather poorly printing:

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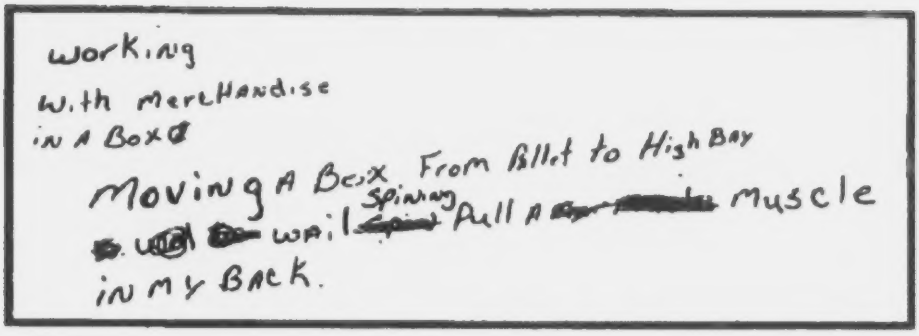
[12] Dr. Mears did attempt to contact Moore's ex-wife, but he was unable to locate her.



These sentences do not appear to be written by someone functioning at the eleventh-grade level. Further, Dr. Mears's description of the academic functioning of an eleven-year old who performs below the third-grade level as "really not bad at all" seems conclusory, rather than analytical, in nature.

In order for Moore to satisfy this adaptive functioning criterion, he must have significant limitations, i.e. be two standard deviations below the mean, in either his conceptual skills, his social skills, or his practical skills. Because there is no objective standard to retrospectively measure Moore's adaptive behavior prior to age eighteen, both experts had to rely on their clinical judgment to make this assessment. Both agreed that Moore had some limitations, but Dr. Llorente testified that those deficits were significant and Dr. Mears testified that they were not.

I. Conceptual skills

Conceptual skills include cognitive, communication, and academic skills. AAMD 10th ed. at 41. Examples are skills related to language, reading and writing, money concepts, and self direction. *Id.* at 82. Moore's significant deficits in conceptual skills are the most striking of all his deficiencies. Notwithstanding the differing opinions of the two experts, the Court is most persuaded by the objective and well documented standardized achievement test results reported in Moore's elementary school records. Moore never tested at his own grade level, and his standardized test scores placed him further behind each year, as shown in the chart below.

Moore's age	Actual grade level	Functioning grade level	Difference between actual and functioning grade levels
7	1-7	1-	-7 grade levels
10	3.6	1.9	1.5 grade levels
11	4-7	2-9	1-8 grade levels
12	5-7	3-4	2-3 grade levels

The fact that Moore struggled in learning to read and do math is substantiated by not only his school

records but by substantial lay testimony as well. It is undisputed that Moore had to repeat the first grade, after which, although he was a year older than his classmates, he still performed poorly academically and was placed in special classes. Although Moore was in the eleventh grade when he was expelled, there is no evidence he was able to do any high-school level work. Moore made it to the eleventh grade by cheating off his sister and being passed along, or socially promoted, by his teachers. Moore's school records demonstrate his significant limitations in conceptual skills at an early age.

These limitations in conceptual skills are further evidenced by Moore's difficulty in following directions and learning new skills his entire life. Moore struggled until well into his school years to learn how to tie his shoes. Even in junior high school, he had a very difficult time following directions written on the chalkboard. As an older adolescent, Moore could not grasp the concept of working in unison with someone when lifting heavy objects. Moore had difficulty properly filling out a basic job application and was unable to count money and tell time. Throughout his childhood and adolescence, Moore had difficulty learning new skills at appropriate ages such as learning to ride a bicycle, operating a tractor, and driving a car.

ii. Social skills

Social skills include skills related to interpersonal relationships, responsibility, self-esteem, gullibility, naivete, following rules, obeying laws, and avoiding victimization. *Id.* Moore's history suggests that he has significant limitations in social skills.

Moore's limitations in social skills are evidenced by his victimization as a child. Moore did not comprehend the danger his father posed when he was intoxicated and did not know to run and hide when his father became violent. As a result of his deficient cognitive abilities Moore often suffered from his father's abuse and ultimately from his stepmother's repeated sexual molestations. Regarding gullibility and naivete, both Carl Jackson and Cynthia Easley testified that other children his age were able to exploit Moore's deficiencies and trick him out of his candy and money. Regarding following rules, Mary Hughes, one of Moore's middle school teachers, testified that she often observed him sitting out in the hall because of disruptive behavior.

Moore's history suggests that he lacks the ability to maintain lasting or productive relationships. He was described as a loner who was socially isolated and ostracized by other children for being slow. Several incidents during his developmental period suggest that he was unable to resolve disagreements or misunderstandings without recourse to violence. He was expelled from high school in the eleventh grade for punching the principal, he once attacked his girlfriend's car with a baseball bat, and he once discharged a firearm in his father's house, apparently while complaining to him about a different girlfriend.[13] In his 1993 intake interview with the Texas Department of Criminal Justice, he stated that he never got along with his father and he got along with his mother's side of the family, but no one else.

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[13] *See* Memorandum Opinion in *Moore v. Johnson*, 1:99-cv-18 (E.D. Tex. Nov. 9, 2001).

iii. Practical skills

Practical skills include skills related to personal daily living activities such as eating, dressing, mobility, and toileting; instrumental daily living activities such as preparing meals, taking medications, using the telephone, managing money, using transportation, and housekeeping activities; occupational skills; and maintaining a safe environment. *Id.* The evidence indicates that Moore has some limitations in his practical skills. According to those who knew Moore as a child, he had trouble dressing himself long beyond the age that most children master this skill. Not only did Moore struggle with the physical aspects of dressing, such as tying his shoes or correctly buttoning his shirt, he also struggled with dressing appropriately, such as putting on clean clothes each day and dressing for the weather.

Moore's adult work history is ambiguous. While Moore held some unskilled positions, he had problems with absenteeism and apparently did not hold these positions long. Moore's ability to work in unskilled labor positions is not inconsistent with his otherwise demonstrated limitations in cognitive and adaptive functioning.

iv. Conclusion

Considering all this evidence, Moore proved by a preponderance of the evidence that he meets the adaptive functioning criterion. Specifically, Moore has significant limitations in his conceptual and social skills that place him more than two standard deviations below the mean. While Moore also has limitations in his practical living skills, those limitations are not so great as to be considered significant.

3. Onset before age eighteen

A. Standard

In order to be assessed as mentally retarded, significantly sub-average intellectual functioning and related adaptive deficits must manifest before the individual is eighteen. If they manifest after age eighteen, the individual can be diagnosed with dementia, but not with mental retardation.

B. Lay testimony and other evidence

As described under the previous two criteria, the three IQ tests Moore has taken indicate he has significant sub-average intellectual functioning. Moore's first test, taken when he was six, meets the AAMR's standards for significantly sub-average adaptive functioning. As discussed, Moore's family members and acquaintances testified about Moore's adaptive deficiencies as a child and adolescent.

C. Experts' opinions

Based on his interview with Moore, his interviews with others who knew Moore as a child, and his review of Moore's school, work, and criminal records, Dr. Llorente testified that he believed Moore's intellectual and adaptive difficulties began before Moore reached age eighteen. Although he does not believe Moore is mentally retarded, Dr. Mears also agreed that Moore's deficits probably manifested before Moore was eighteen.

D. Court's findings

Moore's low IQ score at age six, his grades and standardized test scores, and the testimony that he began displaying significant adaptive deficiencies at a young age establish that his limitations in intellectual functioning and adaptive behavior manifested before his eighteenth birthday. Combined with the fact that both parties' experts agreed that any deficits arose before Moore was eighteen, Moore established, by a preponderance of the evidence, this criterion of mental retardation.

CONCLUSION

Having considered the law as set forth in *Atkins* and *Briseno,* the AAMR definition of mental retardation, the evidence presented at the hearing, and the briefs and arguments of counsel, the Court is of the opinion that Moore has established by a preponderance of the evidence that he is mentally retarded, which the United States Supreme Court held in *Atkins* protects such individuals from execution. Accordingly, the Court will issue a writ of *habeas corpus* to the Director, directing him to release Moore from custody unless the State of Texas, within 180 days, either permanently stays Moore's execution or reforms his sentence to life imprisonment.

APPENDIX IV

FILED FEBRUARY 5, 2003

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. 38,670-02

EX PARTE ERIC LYNN MOORE

HABEAS CORPUS APPLICATION
FROM COLLIN COUNTY

Per Curiam.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Art. 11.071, Sec. 5, V.A.C.C.P.

On June 19, 1991, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted under Art. 37.071, V.A.C.C.P., and the trial court, accordingly set punishment at death. The conviction was affirmed on direct appeal. *Moore v. State*, 882 S.W.2d 844 (Tex.Cr.App. 1994).

Applicant presents a single allegation. We have reviewed the application and find it fails to contain sufficient specific facts which would satisfy the requirements of Art. 11.071, Sec. 5(a), V.A.C.C.P. Accordingly, the application is dismissed as an abuse of the writ.

IT IS SO ORDERED THIS THE 5TH DAY OF FEBRUARY, 2003.

Do No Publish.

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(2)

No. 09-627

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Petitioner,

V.

ERIC LYNN MOORE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THIS IS A DEATH PENALTY CASE.

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CAPITAL CASE

QUESTIONS PRESENTED (RESTATED)

1. Should this Court grant plenary review to address the correctness of the unanimous, *per curiam* opinion of the *en banc* Court of Appeals when the class of similarly-situated *Atkins* complainants who would be affected by a decision is minuscule or non-existent, and the Respondent would likely prevail on other grounds that the court below never addressed?

2. Should this Court devote its limited resources to determine whether Texas has adopted a bright-line cut-off I.Q. score of 70 when the Petitioner never advanced the argument below; the Texas Court of Criminal Appeals or the Texas legislature can clarify any perceived misinterpretation of state law implementing *Atkins*; and the unpublished decision of the Court of Appeals is binding on no one but the parties?

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I. THIS COURT SHOULD NOT GRANT PLENARY REVIEW TO ADDRESS THE CORRECTNESS OF THE UNANIMOUS, *PER CURIAM* OPINION OF THE *EN BANC* COURT OF APPEALS, BECAUSE THE CLASS OF SIMILARLY-SITUATED *ATKINS* COMPLAINANTS WHO WOULD BE AFFECTED BY A DECISION IS MINUSCULE OR NON-EXISTENT, AND THE RESPONDENT WOULD LIKELY PREVAIL ON OTHER GROUNDS THAT THE COURT BELOW NEVER ADDRESSED 17

A. A decision by this Court would be unlikely to affect any other cases in Texas, let alone have a national impact 17

B. The judgment below would likely be affirmed on other grounds 19

II. THIS COURT SHOULD NOT DEVOTE ITS LIMITED RESOURCES TO DETERMINE WHETHER TEXAS HAS ADOPTED A BRIGHT-LINE CUT-OFF I.Q. SCORE OF 70, BECAUSE THE STATE NEVER RAISED THE ARGUMENT BELOW; THE TEXAS COURT OF CRIMINAL APPEALS OR THE TEXAS LEGISLATURE CAN CLARIFY ANY PERCEIVED MISINTERPRETATION OF STATE LAW IMPLEMENTING *ATKINS*; AND THE UNPUBLISHED DECISION OF THE COURT OF APPEALS IS BINDING ON NO ONE BUT THE PARTIES 23

A. The Petitioner failed to raise the issue in the court below 23

B. The Texas courts or the Texas legislature can clarify any perceived misinterpretations of state law implementing *Atkins* 24

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American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) 5,14

No. 09-627

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Petitioner,

V.

ERIC LYNN MOORE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Eric Lynn Moore asks this Court to deny Petitioner Rick Thaler's petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to 28 U.S.C. § 2254(b)(1), this case involves two constitutional provisions:

1. The Eighth Amendment, which provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Fourteenth Amendment, which provides, in relevant part, that "No state may deprive any person of life [or] liberty . . . without due process of law."

STATEMENT OF FACTS

I. Facts Regarding Exhaustion Issue

A. Texas's Subsequent Application Procedures

For a death row inmate like Mr. Moore, who had already filed his first state habeas petition before this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), a subsequent habeas application pursuant to Article 11.071 of the Texas Code of Criminal provides the only available state-court remedy to vindicate the substantive Eighth Amendment *Atkins* right. However, Article 11.071 contains no provisions "for the appointment of counsel, or for investigative or expert funding, for the preparation of subsequent writ applications, as it does for preparation of an initial writ application." *Ex parte Blue*, 230 S.W.3d 151, 166-67 (Tex. Crim. App. 2007). In *Blue*, the Texas Court of Criminal Appeals ("CCA") admitted its inability to resolve the dilemma facing volunteer counsel representing indigent death row inmates in successive habeas proceedings:

> This means that *pro bono* subsequent writ counsel is put in the unfortunate position of having to choose whether to personally bear the costs of expert and investigative assistance, raise the costs himself from private charitable sources, file a writ application without such assistance that will almost surely fall short of the statutory burden, or file no writ application at all despite his good faith suspicions. This is a regrettable dilemma for any attorney to have to face who is already giving generously and commendably of his own time. But it is one we are not at liberty to solve for him, in light of the legitimate legislative judgment as expressed in the statute. Counsel for the applicant, and others similarly situated, must present their dilemma for the consideration of the Legislature.

Id. at 167.

In *Blue*, the CCA noted that the subsequent application provisions do not pose a problem for legitimate *Atkins* applicants who filed their first habeas petitions before *Atkins* was decided: "Subsequent applicants ***who can make the requisite threshold showing*** have been able to rely upon Article 11.071, Section 5(a)(1) for authority to proceed on the merits." 230 S.W.3d at 156 n.20 (emphasis added).[1] One CCA judge sought to define the threshold showing:

> [A]n applicant must, at a bare minimum, provide evidence of at least one I.Q. test (preferably taken before the age of 18) from which a reasonable trier of fact could conclude that the person is mentally retarded under *Atkins*. Better yet is evidence of several such I.Q. tests, coupled with supporting school and medical records, and record evidence or affidavits from qualified experts (or laymen with sufficient personal knowledge of specific conduct) that at least raise an issue concerning applicant's lack of adaptive skills and the onset of mental retardation before age 18.

Ex parte Williams, 2003 WL 1787634, at *2 (Tex. Crim. App. Feb. 26, 2003) (Cochran, J., concurring) (unpublished). A few months later, in another opinion concurring in the dismissal of a successive *Atkins* petition, Judge Cochran reiterated her position in *Williams* but this time acknowledged that "an indigent death row inmate usually does not have the financial or investigative resources necessary to provide full documentation of an *Atkins* claim when filing a

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[1] Section 5(a)(1) provides:

> [A] court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]

Tex. Code Crim. P. art. 11.071 § 5(a)(1) (West 2009).

subsequent application." *Ex parte Jacobs*, No. 34,253-04 (Tex. Crim. App. May 12, 2003) (Cochran, J., concurring) (unpublished)).

By contrast, a death row inmate challenging his conviction and sentence in a first state habeas application need not make any threshold showing to be entitled to appointed counsel to prepare the application. *See* Tex. Code Crim. P. art. 11.071 § 2(a) (providing that "[a]n applicant shall be represented by competent counsel"). To obtain prepayment of funds for investigators or experts to develop a claim for a first petition, an applicant need only state "specific facts that suggest that a claim of possible merit may exist." Tex. Code Crim. P. art. 11.071 § 3(b)(2). The applicant would, of course, have the assistance of appointed counsel to prepare the motion for funds. The State of Texas reimburses the counties for the cost of appointed habeas counsel's services and expenses on a first habeas application up to $25,000. Tex. Code. Crim. P. art. 11.071 § 2A(a). Counties may reimburse appointed counsel for fees and expenses exceeding that amount. Tex. Code Crim. P. art. 11.071 § 2A(c).

B. **The State-Court *Atkins* Proceedings**

Only six months after *Atkins*, and eight days after the United States Court of Appeals for the Fifth Circuit denied his petition for rehearing in his initial federal habeas corpus proceedings, Mr. Moore filed a successive state habeas petition raising an *Atkins* claim. Because Mr. Moore was indigent, and Article 11.071 did not entitle him to counsel to prepare the successive petition, his federal habeas counsel represented him *pro bono*. Counsel relied solely on the reporter's record of the capital murder trial to support the *Atkins* claim, because Article 11.071 did not give Mr. Moore the right to fact-development resources, and *pro bono* counsel was unable to pay for an investigator or expert out of his own pocket.

Mr. Moore referred repeatedly to this Court's recent decision in *Atkins*, in both the title of his pleading ("Successor Application for Post-Conviction Relief Pursuant to Article 11.071 § 5 and *Atkins*") and throughout the text. He specifically alleged that his execution "would violate the Eighth Amendment as cruel and unusual punishment, as he is retarded and mentally impaired." Citing the trial record, Mr. Moore set out concrete allegations of mental retardation. Dr. Jay Crowder, a psychiatrist, testified that Mr. Moore's intellectual abilities were "clearly below average." He testified that Mr. Moore scored a 74 on a school-administered I.Q. test. Mr. Moore attached the testimony of a psychiatrist in an unrelated case that indicated that such an I.Q. score was within the range of mental retardation. Dr. Crowder also testified that Mr. Moore was in special education throughout school. Referring to the trial record, Mr. Moore alleged that he had suffered multiple head injuries, which compounded his low level of intellectual functioning. Dr. Crowder testified that Mr. Moore had probably sustained damage to his brain that could cause violent, irritable, uncontrolled, or disinhibited behavior. In sum, Mr. Moore presented evidence relating to each of the elements defining mental retardation: his 74 I.Q. score is within the range of significantly subaverage intellectual functioning; his attendance in special education classes indicates an adaptive deficit in conceptual skills; and both his I.Q. score and participation in special education classes occurred while he was in school, suggesting onset before the age of eighteen. *See* American Association on Mental Retardation ("AAMR"), *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002) (defining mental retardation).

Mr. Moore explicitly called to the state court's attention *Atkins*'s command that the States "develop appropriate ways to enforce" the Eighth Amendment's categorical rule exempting the

mentally retarded from capital punishment. He noted that the Fifth Circuit had held that *Atkins* applied retroactively, but that this Court had not provided any guidance on how to apply its ruling to prisoners who had already been convicted and sentenced to death before *Atkins* was decided. He added that the CCA had not issued any published decisions defining mental retardation.

Mr. Moore reminded the state court of his indigence, and asked it to provide him with "an opportunity to be evaluated." He also asked the state court to "allow him a constitutionally sufficient period within which to file such amendments to [his] application as may be necessary to bring all proper matters before the Court and avoid unnecessary piecemeal litigation." Finally, Mr. Moore asked the court to hold an evidentiary hearing.

In a separate motion filed simultaneously with his subsequent application, Mr. Moore attached an Affidavit of Inability to Pay Court Costs and asked the state court to appoint counsel "to prepare and file a successor writ of habeas corpus ordering that his death sentence be vacated." He asked the court to appoint his federal habeas counsel, who was "willing [to] accept and pursue Mr. Moore's case in the Courts in the State of Texas under appointment." Finally, Mr. Moore asked the state court to allow him to continue to proceed *in forma pauperis*.

The CCA implicitly denied Mr. Moore's request for counsel, an expert evaluation, an opportunity to amend the application, and an evidentiary hearing. Dismissing the application as abusive, the CCA found that the *Atkins* claim "fails to contain sufficient facts which would satisfy the requirements of Art. 11.071, Sec. 5(a), V.A.C.C.P." *Ex parte Moore*, No. WR-38,670-02 (Tex. Crim. App. Feb. 5, 2003) (unpublished).

C. **The Federal-Court *Atkins* Proceedings**

1. **The Authorization Proceedings**

On February 11, 2003, only six days after the CCA dismissed his *Atkins* claim, Mr. Moore filed a motion seeking permission from the Court of Appeals to file a successive habeas petition in federal district court. The motion for authorization, and the attached proposed successive petition, contained the same evidence of mental retardation that he presented in state court. On February 19, 2003, the convicting court scheduled Mr. Moore's execution for May 21, 2003. After the State filed its opposition to authorization, a staff attorney at Texas Defender Service ("TDS"), a small non-profit, non-governmental agency, provided *pro bono* assistance to Mr. Moore and obtained some of his school records.[2] Mr. Moore attached these records to his response to the State's opposition to authorization. ROA 49-52.[3] The records confirmed that Mr.

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[2] In the wake of *Atkins*, TDS lawyers attempted to assist numerous potentially mentally retarded death row inmates. TDS staff attorneys provided *pro bono* assistance to uncompensated counsel of record or became directly involved in cases where the attorney of last resort abandoned the client. *See, e.g.*, *Ex parte Hearn*, No. WR-50,116-02 (Tex. Crim. App. Mar. 3, 2004) (unpublished); *Ex parte Hines*, No. WR-40,347-02 (Tex. Crim. App. Dec. 9, 2003) (unpublished); *Ex parte Van Alstyne*, No. WR-33,801 (Tex. Crim. App. Feb. 13, 2003) (unpublished); *Ex parte Taylor*, No. WR-48,498-02 (Tex. Crim. App. Jan. 22, 2003) (unpublished); *Ex parte Clark*, No. WR-37,288-02 (Tex Crim. App. Nov. 20, 2002) (unpublished); *Ex parte Modden*, No. WR-11,364-05 (Tex. Crim. App. Sept. 11, 2002) (unpublished); *Ex parte Davis*, No. WR-40,339-05 (Tex. Crim. App. Aug. 8, 2002) (unpublished). Due to the volume of cases with execution dates, along with the lack of staff and resources, TDS was often unable to conduct the type of in-depth investigation necessary to develop *prima facie* evidence of mental retardation sufficient to satisfy the subsequent application provisions of Article 11.071. Because TDS did not become aware of Mr. Moore's case until after he had received an execution date, it did not provide any assistance to him until well after the CCA had dismissed the *Atkins* claim as abusive and the motion for authorization was pending in the Fifth Circuit.

[3] References to the Fifth Circuit Record on Appeal are noted as "__ ROA __." Citations to the transcripts of the federal evidentiary hearing are noted as "__ EH __." Citations to Mr. Moore's exhibits admitted at the hearing are referred to as "MX __ at __." Citations to the

Moore had been tested with an I.Q. of 74, when he was six years old, and revealed that he had been referred to special education classes almost immediately upon entering school. In addition, the records showed that, by the time he was in the fourth grade, Mr. Moore was functioning at only a second-grade level and that, by the fifth grade, he functioned at a third-grade level. It appears that Mr. Moore failed the fourth grade, because the records reflect that he was "promoted" to the fifth grade and was a year older than his classmates. He did not graduate from high school.

Mr. Moore reminded the Fifth Circuit about the limited scope of its review at the request-for-authorization stage and explained his attempt to develop the facts in state court:

> To require Mr. Moore to provide further proof he is mentally retarded in order to have the opportunity to demonstrate the same in the district court would ignore the plain language of the statute and would improperly place this court in the role of a trier of fact. Further support for such a claim will be developed once counsel is appointed for Mr. Moore and expert and investigative assistance is provided. Such assistance was requested in Mr. Moore's state habeas application, but was denied on unexplained procedural grounds.

Movant's Reply on Motion for Authorization at 10-11.

On May 12, 2003, the Fifth Circuit granted Mr. Moore permission to file a successive habeas petition in the District Court. Acknowledging that "[t]he facts surrounding Mr. Moore's alleged retardation have not been developed," the Fifth Circuit nonetheless found that he had presented sufficient evidence to make a *prima facie* showing that he is mentally retarded. ROA at 15-17. The Fifth Circuit granted Mr. Moore's motions to proceed *in forma pauperis* and for appointment of counsel.

State's exhibits are referred to as "SX __ at __." Citations to the appendices attached to the Petitioner's petition for writ of certiorari are referred to as "PA at __"

2. The District Court Proceedings

Mr. Moore filed his successive petition in the District Court the next day, and the court granted his motion for stay of execution. He promptly sought funding for a mental health expert to review the evidence and evaluate him, and a mitigation specialist to investigate his background, locate relevant witnesses, and determine whether he had adaptive deficits. The State opposed Mr. Moore's request for an expert and investigator, contending that any new evidence developed through such assistance would be unexhausted. In the alternative, the State argued that the District Court should provide funding only for an investigator, who would be limited to obtaining records of the I.Q. scores, school records, and head injuries mentioned in the successive state habeas petition. The District Court denied Mr. Moore's motion as premature and ordered the parties to address whether Mr. Moore should have received an evidentiary hearing in state court.

Mr. Moore argued that Texas's refusal to afford him the "tools" to present his claim of mental retardation was unexplained, arbitrary, and unconstitutional, ROA 110-01, and left him "with no avenue for relief in the State courts." *Id.* at 113. He noted that cases in which the CCA found the applicant to have met the threshold involved applicants who were financially able to retain the assistance of experts to review records and make a preliminary diagnosis of mental retardation. Mr. Moore emphasized that he did not have access to these resources. He argued that because Texas "has abdicated its responsibility to protect its citizens from unconstitutional execution, the remedy lies in this Court." *Id.* at 115. Urging the District Court to hold an evidentiary hearing, Mr. Moore explained that he did not fail to develop the facts of his *Atkins* claim in state court; through no fault of his own, the CCA deprived him of the ability to develop

the facts. Finally, he renewed his request for the tools needed to develop evidence of his mental retardation.

After some additional proceedings, the District Court concluded that Mr. Moore had not failed to develop the facts of his claim in state court and was, therefore, entitled to an evidentiary hearing. *Moore v. Dretke*, No. 6:03-cv-224 (E.D. Tex. June 8, 2004) (unpublished). The court authorized $7,500 for appointment of a mental retardation expert and social history investigator. The court also granted Mr. Moore's motion for issuance of subpoenas and payment of his lay witnesses' travel expenses related to the hearing. In the weeks leading up to the hearing, the District Court granted Mr. Moore's request for an additional $10,000 for expert services, and approved payment of over $15,000 for appointed counsel's services. The District Court approved Mr. Moore's request to conduct videotaped depositions of four additional witnesses after the hearing, and authorized payment of the court reporter transcribing the depositions. The court granted Mr. Moore's motion to provide without cost a transcript of the evidentiary hearing. Appointed counsel received an additional $17,000 for his services in the District Court, and his investigator received over $11,000 for her work. On July 1, 2005, the District Court found that Mr. Moore had established by a preponderance of the evidence that he is mentally retarded. *Moore v. Dretke*, 2005 WL 1606437 (E.D. Tex. July 1, 2005) (unpublished).

II. Facts Regarding the *Atkins* Issue

Over the course of a three-day hearing, the District Court heard testimony from eleven lay witnesses and two expert witnesses, and admitted 26 exhibits offered by the parties. The court also reviewed the depositions of four more witnesses taken after the hearing. The District Court issued a 29-page opinion assessing the evidence and concluding that Mr. Moore is mentally

retarded. PA at 64-97.

A. **Evidence of Subaverage Intellectual Functioning**

Antolin Llorente, Ph.D., a neuropsychologist, conducted a full mental retardation assessment of Mr. Moore. He administered two intelligence tests, the WAIS-III and the TONI-2. The results of the WAIS-III revealed that Mr. Moore has a full-scale I.Q. of 66, placing him within the lowest one percent of the population in terms of intelligence. 1 EH 153-54, 166; MX 1. In an attempt to estimate Mr. Moore's intellectual ability using an instrument less dependent on language and verbal reasoning, Dr. Llorente also administered the TONI-2, a test of non-verbal reasoning. 1 EH 153; MX 1. Mr. Moore obtained a score in the "Very Poor Range," placing him in the 0.8th percentile. 1 EH 154-56; MX 7 at 65. Dr. Llorente testified that the results of the TONI-2 were consistent with the WAIS-III score. 1 EH 154; *see* MX 1. Dr. Llorente also administered a test designed to detect effort to perform poorly and found that Mr. Moore was putting forth his best effort. 1 EH 159-62.

Dr. Llorente reviewed the results of the Primary Mental Abilities Test ("PMA"), given to Mr. Moore when he was six-and-a-half years old, and on which he obtained an I.Q. score of 74. 1 EH 139-40. According to Dr. Llorente, taking into account the standard error of measurement, the results of the PMA, although inflated, and the WAIS-III were consistent, and both satisfied the first element of the definition for mental retardation. 1 EH 139-41, 166-67.

Dr. Llorente also reviewed the WAIS-R administered in 1991 by Dr. Fulbright. Mr. Moore obtained an I.Q. score of 76. SX 7. The WAIS-R was the result of re-norming the WAIS in 1978, so its norms were 13 years out-of-date when Dr. Fulbright administered the test. 1 EH 176; MX 9, 10, 12. Mr. Moore's I.Q. score, therefore, was subject to the "Flynn Effect," which

recognizes that norm I.Q.'s across a population have increased approximately three points per decade. 1 EH 175-78. Dr. Llorente testified that Mr. Moore's score had to be adjusted by 3.9 points, to reflect his true I.Q. of 72.1, with a five-point standard error of measurement. 1 EH 176-78; *see* MX 9,10,12. Dr. Llorente concluded that Mr. Moore's score on the WAIS-R in 1991 was psychometrically consistent with the scores he obtained in 2004 on the WAIS-III and TONI-2. 1 EH 163, 166, 178-79. The State's expert, Gary Mears, Ph.D., conceded on cross-examination that Mr. Moore had satisfied the intellectual functioning prong of the definition of mental retardation. 3 EH 3-4.

The District Court had the benefit of extensive testimony from Dr. Llorente and Dr. Mears regarding the reliability, validity, and significance of all the intellectual functioning tests. It also had an opportunity to observe their demeanor and assess their credibility. After giving full consideration to that testimony, the District Court explicitly found Dr. Llorente more credible than Dr. Mears, PA at 90, and concluded that Mr. Moore had met the subaverage intellectual functioning prong of the definition of mental retardation. *Id.* at 73-74.

B. Evidence of Adaptive Deficits

The District Court heard an abundance of testimony concerning Mr. Moore's adaptive deficits in functional academics. The court found Mr. Moore's academic records to be "some of the most objective and enlightening evidence presented." *Id.* at 77. These records reveal that Mr. Moore attended school regularly, but he was unable to comprehend the work or benefit from instruction. MX 3; 1 EH 41-42, 61, 145; 2 EH 133-34. Mr. Moore flunked the first grade and was referred to special education. MX 3; 1 EH 67, 143-44. Kelly Moore and LaGayla Moore, Mr. Moore's sisters, were also placed in special education, and Mr. Moore was slower than both

of them. 1 EH 76. Kelly Moore, who is a year younger than Mr. Moore, assisted him with his school work, because he became frustrated trying to do it. In the third grade, Mr. Moore, who was by then at least a year older than his classmates, obtained a score on the Comprehensive Basic Skills Test that reflected that he was functioning 1.7 years below his grade level. SX 3; 1 EH 156-58; 2 EH 110. Halfway through the fourth grade, Mr. Moore scored below the third-grade level on the Metropolitan Achievement Test. MX 3; 2 EH 126-27. The next year, he was promoted to the fifth grade, despite grades at the failing level. MX 3; 1 EH 147. Mr. Moore was assigned to a corrective reading class. MX 3; 1 EH 147; 2 EH 122, 130. In the seventh month of the fifth grade, Mr. Moore attained scores on a standardized achievement test that showed he was functioning at the level of a third grader in the fourth month of the school year – more than two years below his actual grade level. MX 3; 2 EH 122, 130-32. Despite his failing grades, Mr. Moore was advanced to the sixth grade. SX 3; 2 EH 129.

If Mr. Moore attempted to read, he struggled with understanding the words and would be unable to recall what he had read when asked a short time later. 1 EH 48-49, 96. He refused to give oral reports in school, because he was ridiculed by his classmates for being slow. 1 EH 96-97. In junior high school: (1) Mr. Moore's handwriting was equivalent to that of an elementary school student (1 EH 99); when he participated in group activities, the other students in his group did the work (1 EH 100); he was unable to cut out paper stars as part of an assignment (1 EH 100-01), he could add and subtract numbers but had problems with division (1 EH 101); he was unable to tell time (1 EH 69); he was unable to follow instructions written on the blackboard (1 EH 99, 101); and he was placed in a federal program to assist disadvantaged children whose reading skills were at least two grade levels below their actual grade. 5 ROA 5.

Mr. Moore was socially promoted to the eleventh grade, as was the practice at the time in his school district. 1 EH 41, 67, 98. He eventually enrolled in a G.E.D. program, but failed to complete it. 2 EH 82. In his 1991 report, Dr. Fulbright noted longstanding verbal learning deficits, SX 7, a concern shared by Dr. Llorente. 1 EH 179. Even Dr. Mears conceded that Mr. Moore had some impairments in academic functioning and some learning disabilities. 3 EH 55-56. Dr. Llorente concluded that Mr. Moore had adaptive deficits in functional academics. 1 EH 194; 2 EH 82.

Individuals with mild mental retardation will often provide inaccurate personal histories in an effort to mask or hide their difficulties. 2 EH 98-99; 3 EH 49-50. Mr. Moore would often try to mask or hide his deficiencies, 1 EH 103, 128-29, and both Dr. Llorente and Dr. Fulbright noted that he was a poor historian. MX 1 at 3; SX 7 at 1. As a child, Mr. Moore had difficulty forming sentences and expressing himself. 1 EH 44, 66, 84. Dr. Llorente noted that Mr. Moore's speech was slow. 1 EH 199. He concluded that Mr. Moore had adaptive deficits in his communication skills. 1 EH 193, 197-98; 2 EH 73.

Mr. Moore's history reveals that he lacked the ability to form lasting or productive relationships. As a child, Mr. Moore was withdrawn and distant, a follower rather than a leader. 1 EH 64, 68-69, 102. He was taken advantage of, ridiculed, and ostracized by his classmates for being slow. 1 EH 68, 97; 3 EH 46. Dr. Fulbright noted that Mr. Moore is likely to be more malleable and prone to manipulation quite easily, SX 7, a concern shared by Dr. Llorente. 1 EH 179, 203, 209-11. Individuals with mental retardation may be vulnerable to exploitation by others. AAMR Manual at 82. Mr. Moore's father was an alcoholic who became violent toward his children when drinking. 1 EH 39-40; 6 ROA 8-9. When his father went into a drunken rage

the other children would withdraw or hide, but Mr. Moore did not understand the danger or the need to protect himself. 1 EH 40, 70-71; 6 ROA 9. His stepmother also physically abused Mr. Moore as a child, hitting him with belt buckles, extension cords, and bats. 6 ROA 10. Beginning at age nine, Mr. Moore was sexually abused by his stepmother on a daily basis. 1 EH 74; 2 EH 213; 3 EH 44-45; 6 ROA 10-12; MX 5. His stepmother gave Mr. Moore alcohol and cigarettes at that age. 6 ROA 11. Dr. Llorente concluded that Mr. Moore had significant adaptive deficits in the social skills domain. 1 EH 201-03.

The District Court evaluated the evidence related to the three domains of adaptive behavior and found that Mr. Moore had significant deficits in conceptual and social adaptive skills. The bulk of the court's memorandum opinion consists of a meticulous review of the evidence of Mr. Moore's adaptive functioning. PA at 74-95. The court provides a thorough explanation for its findings, as well as its determination that Dr. Llorente's testimony and assessment were more credible than Dr. Mears's – especially on the adaptive functioning prong:

> Dr. Llorente spent seven to eight hours interviewing and evaluating Moore, while Dr. Mears spent only two to two and a half hours. Dr. Llorente contacted and interviewed Moore's family members to learn about Moore's childhood, while Dr. Mears did not contact or interview anyone because he thought their opinions were not useful. Instead, Dr. Mears relied exclusively on his comparatively brief interview with Moore and his review of Moore's records. Dr. Llorente administered a large battery of tests to Moore. Dr. Mears also performed some tests on Moore, but not nearly as many.
>
> Additionally, Dr. Mears's assessment of Moore's academic record appears less than comprehensive. While Dr. Mears places a great deal of weight on Moore's advancement to the eleventh grade, there was no evidence that Moore was ever able to perform at the eleventh-grade level. . . . Further, Dr. Mears's description of the academic functioning of an eleven-year-old who performs below the third-grade level as "really not bad at all" seems conclusory, rather than analytical, in nature.

PA at 90-91 (footnote omitted).

The District Court described Mr. Moore's significant limitations in conceptual skills "the most striking of all his deficiencies." *Id.* at 92. The court found highly persuasive "the objective and well documented standardized achievement tests" in Mr. Moore's school records. *Id.* The court noted that substantial lay testimony substantiated Mr. Moore's academic struggles as well. *Id.* at 92-93. In addition to finding deficits in conceptual skills, the District Court concluded that Mr. Moore has significant limitations in social skills. *Id.* at 93. The court grounded its finding primarily on Mr. Moore's inability to avoid being victimized, not only by adults but by other children as well. *Id.* at 94. The court also based its finding on Mr. Moore's inability to maintain lasting social relationships. *Id.*

The District Court concluded that Mr. Moore had established by a preponderance of the evidence that he is mentally retarded. *Id.* at 97.[4] The State appealed. After the *en banc* Fifth Circuit returned the case to the panel for a review of the merits, a divided panel held that the District Court had not committed clear error in finding Mr. Moore mentally retarded. *Moore v. Thaler*, No. 05-70038, 2009 WL 2573295 (5th Cir. Aug. 21, 2009) (unpublished) (PA at 1-58).

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[4] The parties did not dispute the final element of the definition of mental retardation, PA at 96-97, and the State raised no complaint below about the District Court's finding that Mr. Moore manifested significant limitations in intellectual and adaptive functioning before the age of 18.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT GRANT PLENARY REVIEW TO ADDRESS THE CORRECTNESS OF THE UNANIMOUS, *PER CURIAM* OPINION OF THE *EN BANC* COURT OF APPEALS, BECAUSE THE CLASS OF SIMILARLY-SITUATED *ATKINS* COMPLAINANTS WHO WOULD BE AFFECTED BY A DECISION IS MINUSCULE OR NON-EXISTENT, AND THE RESPONDENT WOULD LIKELY PREVAIL ON OTHER GROUNDS THAT THE COURT BELOW NEVER ADDRESSED.

A. A decision by this Court would be unlikely to affect any other cases in Texas, let alone have a national impact.

Every single member of the 17-judge *en banc* Court of Appeals concluded that, because Texas had no published case law setting out the standards for raising an *Atkins* claim at the time Mr. Moore filed his successive state habeas petition, he met the cause-and-prejudice exception to procedural default. PA at 62-63. The *en banc* court issued a *per curiam*, five-page opinion. Clearly, such a ruling is not indicative of an issue that has caused confusion, dissension, or vexation among the lower courts. At a minimum, it is a strong basis for denying review that the Petitioner has utterly failed to show any disagreement among the judges of the court below regarding the precise legal issue it insists this Court should expend its limited resources to consider.

Despite the Petitioner's hyperbolic assertion that the opinion of the *en banc* Court of Appeals will have "wide-reaching" implications, Petition at 24, it is likely that no one other than Mr. Moore will be affected by the decision. The cause-and-prejudice ruling of the Court of Appeals will apply only to those inmates (1) who had already been sentenced to death and had filed their initial habeas petition in state court before this Court decided *Atkins*; and (2) who had

raised a successive *Atkins* claim in state court prior to February 26, 2003, the day the Texas Court of Criminal Appeals ("CCA") handed down its unpublished decision in *Ex parte Williams*, No. WR-43,907-02, 2003 WL 1787634 (Tex. Crim. App. 2003). On June 20, 2002, the day the Court decided *Atkins*, this class of prisoners definitively closed. Given the typical interval between sentencing and the filing of state habeas application, however, this class more likely closed several years prior to the decision in *Atkins*.

The court below recognized that the "unique circumstances" of Mr. Moore's case satisfied cause and prejudice. PA at 62. If any other inmates besides Mr. Moore are so precisely positioned to benefit from the *en banc* court's ruling, Counsel for Respondent is unaware of who they may be. Because the question presented is founded on these "unique circumstances," it simply has no jurisprudential or practical significance that calls out for this Court's intervention.

This case's singularity may also be explained by its protracted procedural path in the Court of Appeals after the District Court granted relief on the *Atkins* claim. On June 29, 2006, a divided panel of the Court of Appeals concluded that Mr. Moore had failed to exhaust his *Atkins* claim, vacated the judgment, and remanded the matter to the District Court with instructions to dismiss without prejudice. *Moore v. Quarterman*, 454 F.3d 484, 494 (5th Cir. 2006). Mr. Moore petitioned the appellate court for rehearing *en banc*. The Court of Appeals did not rule on the petition for almost an entire year. On June 27, 2007, a divided panel treated the petition for rehearing *en banc* as a petition for panel rehearing, withdrew its earlier opinion, and substituted a new one. *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007). With few substantive changes, two judges again found that Mr. Moore had failed to exhaust his *Atkins* claim. However, instead of dismissing the claim without prejudice while Mr. Moore returned to state court, the majority

dismissed the claim ***with*** prejudice, because it concluded that Mr. Moore had defaulted his state-court remedies. *Id.* at 215. Mr. Moore, once again, filed a petition for rehearing *en banc*. On March 12, 2008, the Court of Appeals granted his request. On June 26, 2008, the *en banc* court unanimously found that Mr. Moore had demonstrated cause and prejudice for his failure to exhaust. *Moore v. Quarterman*, 533 F.3d 338 (5th Cir. 2008) (*en banc*).

In short, this case presented the *en banc* Court of Appeals with a unique situation, highly unlikely ever to occur again: the dismissal with prejudice of an *Atkins* claim ***after*** the district court had conducted an evidentiary hearing and found the prisoner to be mentally retarded. Any principle the Court might announce in this case would have no prospective application to the administration of capital punishment in Texas, let alone across the Nation. This Court's intervention is unwarranted.

B. <u>The judgment below would likely be affirmed on other grounds.</u>

The *en banc* Court of Appeals avoided – or never reached – several exhaustion arguments that Mr. Moore raised in addition to cause-and-prejudice. Consequently, even if this Court were to grant review and reverse the judgment below, it is likely that Mr. Moore would prevail on other grounds. Under these circumstances, there is little compelling reason for this Court to grant certiorari.

Besides his cause-and-prejudice argument, Mr. Moore advanced three other procedural arguments in the court below. First, he asserted that he had properly exhausted his *Atkins* claim. With specific citations to the trial record and testimony of a psychiatrist, Mr. Moore alleged in his state habeas application "that [he] was clearly below average intelligence," that school tests showed he had an I.Q. of 74, and that this score was within the range for mental retardation.

Based on the psychiatrist's testimony, Mr. Moore alleged that he was in special education throughout school, that he had multiple head injuries that compounded his low level of intellectual functioning, and that he demonstrated behavior consistent with damage to the temporal lobes. Mr. Moore explicitly called to the state court's attention that this Court had ordered the states to develop ways to enforce *Atkins*, and that Texas had not yet implemented any procedures. Moreover, he reminded the state court of his indigence, and asked it to grant him an opportunity to be evaluated. He also asked the state court to "allow him a constitutionally sufficient period within which to file such amendments to [his] application as may be necessary to bring all proper matters before the Court and avoid unnecessary piecemeal litigation," and to hold an evidentiary hearing. In a separate pleading, Mr. Moore sought appointment of counsel "to prepare and file a successor writ of habeas corpus."

Mr. Moore contended that he neither withheld essential facts from the state court in an attempt to expedite federal review, nor did he intentionally forego any opportunity provided by the state court to develop the facts of his claim. His requests made it clear that he needed qualified, compensated counsel, along with additional resources, to help him investigate and develop the facts in support of his *Atkins* claim. He never suggested that he could prevail on his claim based solely on the evidence he presented in his successive state habeas petition. To hold that a claim supported by facts newly developed in federal court is unexhausted when the prisoner's inability to develop the facts resulted from the state court's refusal to grant him counsel, funding, or an evidentiary hearing – rather than from his lack of diligence – turns the principle of comity on its head, Mr. Moore argued. The exhaustion doctrine respects the integrity of the state courts by giving them the first opportunity to adjudicate alleged violations of federal

constitutional rights, he asserted, but it was never intended to allow the state courts to thwart federal habeas review by refusing to allow any factual development.

In a second, and related, argument below, Mr. Moore contended that, even if the *en banc* Court should conclude that he failed to exhaust the available state-court remedies, it should excuse exhaustion because circumstances rendered the State corrective process ineffective to protect his federal constitutional rights. He argued that, without the right to appointed, compensated counsel or fact-development resources under the Texas successive post-conviction procedures, indigent death row inmates who truly may be mentally retarded are unlikely to make the requisite showing of mental retardation that triggers resources and a remand to the trial court for further proceedings to resolve the claim. *Cf. McFarland v. Scott*, 512 U.S. 849, 856 (1994) (holding that federal habeas appointment statute allows for pre-petition appointment of counsel and assistance of investigators and experts); *In re Hearn*, 376 F.3d 447, 455 (5th Cir. 2004) (holding that, upon a "colorable showing" of mental retardation, the federal habeas appointment statute affords counsel to a death row inmate to investigate and prepare a motion for authorization to file a successive petition raising an *Atkins* claim); *id.* at 458 (Higginbotham, J., concurring) ("I am not prepared to hold that [a death row inmate] must first make a *prima facie* case that he is retarded to be entitled to a lawyer to make that case."). Texas's failure to appoint and compensate post-conviction counsel, or provide some fact-development resources for cases like Mr. Moore's demonstrates that the state corrective process was ineffective to protect his *Atkins* right. *See* 28 U.S.C. § 2254(b)(1)(B). The rule of exhaustion is founded on the assumption that a state's judicial process is entitled to respect from the federal courts precisely because state remedies are adequate and effective to vindicate federal constitutional rights. It

was never intended to permit the state courts to put a choke-hold on federal review of constitutional violations.

Third, Mr. Moore argued below that, because the District Court found that he is mentally retarded, he could overcome any procedural default by showing a fundamental miscarriage of justice – that he is actually innocent of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333 (1992). Mr. Moore asserted that applying procedural default to a meritorious *Atkins* claim serves no legitimate purpose when the Constitution itself deprives the State of the power to impose capital punishment on a certain class of persons. The "fundamental miscarriage of justice" exception recognizes that, under these extraordinary circumstances, the societal interests of finality, comity, and conservation of scarce judicial resources must yield to the imperative of correcting a fundamentally unjust punishment.

The *en banc* Court of Appeals found it unnecessary to resolve "the reasonable arguments [that] can be made for and against Moore's satisfaction of the exhaustion requirement," because "even if Moore failed to exhaust, the unique circumstances here establish cause for his default and prejudice in the absence of federal court review." PA at 62.[5] For the same reason, it did not need to address the "fundamental miscarriage of justice" exception. *Id.* at 62 n.4. Consequently, even if this Court were to reject the *en banc* court's cause-and-prejudice holding, it is likely that Mr. Moore would prevail on one of the additional grounds never reached below. It makes little sense for this Court to spend its valuable time addressing an issue that is not outcome determinative.

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[5] In finding that Mr. Moore had met the "prejudice" prong of the cause-and-prejudice standard, the *en banc* court noted that "Moore's mass of evidence, taken at face value, presented a substantial *Atkins* claim." PA at 63.

II.

THIS COURT SHOULD NOT DEVOTE ITS LIMITED RESOURCES TO DETERMINE WHETHER TEXAS HAS ADOPTED A BRIGHT-LINE CUT-OFF I.Q. SCORE OF 70, BECAUSE THE STATE NEVER RAISED THE ARGUMENT BELOW; THE TEXAS COURT OF CRIMINAL APPEALS OR THE TEXAS LEGISLATURE CAN CLARIFY ANY PERCEIVED MISINTERPRETATION OF STATE LAW IMPLEMENTING *ATKINS*; AND THE UNPUBLISHED DECISION OF THE COURT OF APPEALS IS BINDING ON NO ONE BUT THE PARTIES.

A. **The Petitioner failed to raise the issue in the court below.**

Quoting *Ex parte Briseno*, 135 S.W.3d 1, 7-8 & n.24 (Tex. Crim. App. 2004), the Petitioner asserted in the court below that Texas law defines significantly subaverage intellectual functioning as an I.Q. of "***about*** 70 or below." State's Supplemental Brief at 9 (emphasis added). Now, before this Court, the Petitioner wishes to piggyback onto the argument the dissent advanced below: that Texas, in implementing *Atkins*, has adopted a bright-line cut-off I.Q. of 70 necessary to satisfy the first element of the diagnosis for mental retardation. *See* PA at 33 ("Moore was therefore required to prove that his I.Q. is below a bright-line cut-off of 70. Such a finding could be made ***in spite of***, but not ***because of***, I.Q. measurements above 70.") (emphases in original). The Petitioner never made the argument below that the District Court and the Court of Appeals misinterpreted Texas law by finding that Mr. Moore suffered from significantly subaverage intellectual functioning with his most probative I.Q. scores being ***over*** 70.

The Petitioner failed to raise the bright-line cutoff argument below. The Court of Appeals did not expressly address or decide the question on which the Petitioner now seeks certiorari review. Responding in a footnote to the dissent's raising of the bright-line cut-off argument, the majority confirmed that the Petitioner never made the argument and that, therefore,

the court "found no reason to address it." PA at 10 n.5. The majority noted its reluctance "to create new law in this area where the parties fail to identify or address these novel issues." *Id.* at 11. Accordingly, this Court should not consider it either. *See Meyer v. Holley*, 537 U.S. 280, 291 (2003) (refusing to address issues not directly decided by the court of appeals).

B. The Texas courts or the Texas legislature can clarify any perceived misinterpretations of state law implementing *Atkins*.

In the wake of *Atkins*'s express pronouncement that left to the states the details of enforcing the Eighth Amendment prohibition, states have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. As a consequence, this Court should deny the Petitioner's request that it micro-manage, fine-tune, and federalize every aspect of Texas's procedures for raising and resolving *Atkins* claims. The Court of Appeals recognized that the Texas courts should clarify the state's definition of mental retardation, if it is indeed open to misinterpretation:

> The [dissent's] criticism that the majority fails to take the opportunity to "make sense of Texas's jurisprudence regarding retardation . . . and to provide guidance" is misplaced. [T]he ultimate responsibility for providing guidance and clarifying the relevant standards, especially to the degree that such "clarification" actually calls into question the language articulated in *Atkins* and in *Briseno*, rests with the Texas courts, not with us. *See Atkins*, 536 U.S. at 317 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.")[.]

PA at 10-11 n.5. The dissent begrudgingly concurred: "[B]ecause, under *Atkins*, the states are left to fashion their own response to that decision, the majority's mangling of Texas legal standards is subject to ready correction by the [Texas Court of Criminal Appeals] or the legislature." *Id.* at 57-58. Moreover, even the Petitioner concedes that the Texas courts are better situated to resolve the "state-law question[]" of whether Texas has established a bright-line

cut-off I.Q. score in its implementation of *Atkins*. Petition at 25 n.7.[6] For this reason, the Court should decline to review the second question presented.

C. **The decision below has no precedential value.**

Certiorari should be denied because the question presented is unworthy of this Court's attention. *See* Sup. Ct. R. 10 ("[C]ertiorari will be granted only for compelling reasons"). The Court of Appeals was sufficiently confident that it had correctly decided Mr. Moore's case on the basis of well-settled principles of law that it chose to express its ruling in an unpublished *per curiam* opinion. *See* PA at 1 n.*; 5th Cir.R. 47.5 ("[O]pinions that may in any way interest persons other than the parties to a case should be published."). Unpublished opinions released by the Fifth Circuit after January 1, 1996, are not precedent (except under limited circumstances not applicable here). 5th Cir.R. 47.5.4. The dissent twice noted that the court's ruling had no precedential value. *See* PA at 18 ("The only mitigation is that the majority opinion is unpublished, so it is not binding on anyone or any court."); *id.* at 57 ("The only redeeming feature of the majority's misguided opinion is that . . . it is unpublished and therefore binding as precedent on no one except the parties to this case as it affects only this case."). Nonetheless, even if the decision of the Court of Appeals were debatable, it would not present a compelling reason for this Court's review, because a ruling reversing the judgment would amount only to error correction in a single case. *See* Sup. Ct. R. 10 (cautioning that "certiorari is rarely granted

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[6] Finally, it is worth noting that the Court of Appeals quoted the same passage in *Briseno* as did the State in its Supplemental Brief that defines significantly subaverage intellectual functioning as an "I.Q. of ***about*** 70 or below." PA at 10 n.5 (emphasis added by Court of Appeals). As the Court of Appeals pointed out (in *dicta*), such a phrasing from the leading Texas case implementing *Atkins* hardly suggests that Texas has adopted a bright-line cut-off I.Q. score. *Id.*

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). The second question presented does not demand this Court's review.

CONCLUSION

Mr. Moore asks the Court to deny the petition for writ of certiorari.

Respectfully Submitted,

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No. 09-627

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Petitioner,

V.

ERIC LYNN MOORE,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Brief in Opposition was served on Counsel for Petitioner on this 1st day of February 2010, via First Class United States Mail, addressed to:

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